U.S. Department of Justice
Office of the Inspector General

The September 11 Detainees:

A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks



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CHAPTER ONE

INTRODUCTION

I. BACKGROUND

On September 11, 2001, terrorists hijacked four airplanes and flew two of them into the World Trade Center Towers in New York City and one into the Pentagon in Arlington, Virginia. The fourth plane crashed into a field in southwestern Pennsylvania before it could strike a target in Washington, D.C. The attacks killed more than 3,100 people, including all 246 people aboard the 4 airplanes.

The Federal Bureau of Investigation (FBI) immediately initiated a massive investigation, called "PENTTBOM," into this coordinated terrorist attack. The FBI investigation focused on identifying the terrorists who hijacked the airplanes and anyone who aided their efforts. In addition, the FBI worked with other federal, state, and local law enforcement agencies to prevent follow-up attacks in this country and against U.S. interests abroad.

Shortly after the attacks, the Attorney General directed the FBI and other federal law enforcement personnel to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to, terrorist activities."[1] One of the principal responses by law enforcement authorities after the September 11 attacks was to use the federal immigration laws to detain aliens suspected of having possible ties to terrorism. Within 2 months of the attacks, law enforcement authorities had detained, at least for questioning, more than 1,200 citizens and aliens nationwide.[2] Many of these individuals were questioned and subsequently released without being charged with a criminal or immigration offense. Many others, however, were arrested and detained for violating federal immigration law.

[1] Memorandum from Attorney General John Ashcroft to United States Attorneys entitled "Anti-Terrorism Plan" (September 17, 2001).

[2] In the weeks and months following the attacks, various totals of the number of people arrested in connection with the September 11 investigation were released by the Department of Justice or appeared in media accounts. A senior official in the Department's Office of Public Affairs told the Office of the Inspector General that in the weeks after the terrorist attacks her office provided frequent updates to the media on the number of persons questioned, arrested, and detained by federal, state, and local law enforcement officials. According to this official, the Public Affairs Office stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.

Our review determined that the Immigration and Naturalization Service (INS) detained 762 aliens as a result of the PENTTBOM investigation. Of these 762 aliens, 24 were in INS custody on immigration violations prior to the September 11 attacks. The remaining 738 aliens were arrested between September 11, 2001, and August 6, 2002, as a direct result of the FBI's PENTTBOM investigation. All 762 detainees were placed on what became known as an "INS Custody List" because of the FBI's assessment that they may have had a connection to the September 11 attacks or terrorism in general, or because the FBI was unable, at least initially, to determine whether they were connected to terrorism.

The Government held these aliens in a variety of federal, local, and private detention facilities across the United States while the FBI investigated them for ties to the September 11 attacks or terrorism in general. These facilities included several Federal Bureau of Prisons (BOP) institutions such as the Metropolitan Detention Center in Brooklyn, New York; the Federal Detention Center in Oakdale, Louisiana; and the U.S. Penitentiary in Leavenworth, Kansas; INS facilities such as the Krome Service Processing Center in Miami, Florida; and state and local facilities under contract with the INS to house federal immigration detainees, such as the Passaic County Jail in Paterson, New Jersey, and the Hudson County Correctional Center in Kearny, New Jersey.

Soon after these detentions began, the media began to report allegations of mistreatment of the detainees. For example, detainees and their attorneys alleged that the detainees were not informed of the charges against them for extended periods of time; were not permitted contact with attorneys, their families, and embassy officials; remained in detention even though they had no involvement in terrorism; or were physically abused, verbally abused, and mistreated in other ways while detained.

Several individual detainees and non-profit organizations filed lawsuits against the Department of Justice (Department) protesting the lack of public information about the detainees and the length and conditions of the detainees' confinement. For example, the Center for National Security Studies brought suit against the Department under the Freedom of Information Act seeking information about the detainees, including their names and where they were being held.[3] Five detainees filed a class action lawsuit alleging they were physically abused, verbally abused, and held without a legitimate immigration or law enforcement purpose long after they received final removal or voluntary

[3] Center for National Security Studies v. United States Department of Justice, 01-civ-2500 (D.D.C. filed December 6, 2002).

departure orders.[4] In addition, advocacy organizations such as Amnesty International and the Lawyers Committee for Human Rights issued reports asserting mistreatment of the detainees or mishandling of their cases.[5]

Pursuant to our responsibilities under the USA PATRIOT Act (Patriot Act) and the Inspector General Act, the Department of Justice Office of the Inspector General (OIG) initiated this review to examine the treatment of detainees arrested in connection with the Department's September 11 terrorism investigation.[6] Specifically, the OIG's review focused on:

- Issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general;

- Bond determinations for detainees;

- The removal process and the timing of removal; and

- Conditions of confinement experienced by detainees, including their access to legal counsel.

We focused our review on INS detainees housed at two facilities – the BOP's Metropolitan Detention Center (MDC) in Brooklyn and the Passaic County Jail (Passaic) in Paterson, New Jersey. We chose these two facilities because they held the majority of September 11 detainees and were the focus of many complaints about detainee mistreatment.

Our review did not seek to examine all aspects of the Department's terrorism investigation, including the specific investigative techniques involved in the September 11 investigation or the decisions made by federal, state, and

[4] Turkmen v. Ashcroft, 02-civ-2307 (E.D.N.Y. filed April 17, 2002).

[5] See, e.g., "Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," Human Rights Watch (August 2002); "A Year of Loss: Reexamining Civil Liberties Since September 11," Lawyers Committee for Human Rights (September 5, 2002).

[6] Pub. L. No. 107-56 (2001). The USA PATRIOT Act was signed by the President on October 26, 2001, approximately six weeks after the September 11 terrorist attacks. The Patriot Act provides new or enhanced law enforcement authorities, including the sharing of foreign intelligence information, increased penalties for money laundering and other financial crimes, and stricter controls on immigration. In addition, Section 1001 of the Patriot Act directs the OIG to receive and review claims of civil rights or civil liberties violations by Department employees.

local law enforcement on why to detain specific individuals.[7] Additional issues beyond the scope of this review include the reasons and justifications for the Department's decision to limit public release of information concerning arrests related to the ongoing terrorism investigation, its decision to close immigration proceedings to the public, and its use of voluntary interviews for certain categories of aliens.[8] Several lawsuits related to these issues are ongoing. In addition, our review did not examine the Department's use of material witness warrants to detain certain individuals in connection with its terrorism investigation, another issue currently being litigated in the courts.[9]

Rather, our review focused on the treatment of aliens who were held on federal immigration charges in connection with the September 11 investigation. We examined the reasons why many of the detainees experienced prolonged confinement. In addition, we examined the detainees' conditions of confinement, including their access to counsel, access to medical care, and allegations of physical or verbal abuse by correctional officers.

In this report, we discuss the actions of senior managers at the Department, the FBI, the INS, and the BOP, who established the broad policies and led the investigation in response to the September 11 attacks; the actions of the INS, which processed and detained many of the aliens arrested in the aftermath of September 11; and the actions of the BOP, which housed many of the detainees.

[7] Some constitutional arguments have been raised regarding the Department's treatment of September 11 detainees. The claims were made in a variety of contexts, some of which are inapplicable in the immigration context and some of which are beyond the scope of this report. Removal proceedings are matters of civil rather than criminal law. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). Because they are not criminal proceedings, some constitutional protections that apply in the context of a criminal prosecution do not apply in a removal proceeding. For example, immigration detainees have no Sixth Amendment right to counsel. While they are permitted to be represented by an attorney, they must find and pay for the attorney themselves, unlike in criminal cases where the Government provides defendants with an attorney if they are unable to pay for counsel.

[8] For example, on November 9, 2001, the Department and the FBI sought voluntary interviews with approximately 5,000 male visitors or foreign nationals between the ages of 18 and 33 who had entered the United States after January 2000 from countries "where there have been strong al Qaeda presences." See Attorney General John Ashcroft, Press Conference (March 20, 2002).

[9] A material witness warrant can be obtained from a judge upon a showing that the testimony of a person is material to a criminal proceeding and that it may become impracticable to secure the presence of the person by subpoena. See 18 U.S.C. § 3144. A person held on such a warrant is referred to as a "material witness." See United States v. Awadallah, 202 F. Supp. 2d. 55 (S.D.N.Y. 2002).

In conducting our review, we were mindful of the circumstances confronting the Department and the country as a result of the September 11 attacks, including the massive disruptions they caused. The Department was faced with monumental challenges, and Department employees worked tirelessly and with enormous dedication over an extended period to meet these challenges. It is also important to note that nearly all of the 762 aliens we examined violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation.

II. METHODOLOGY OF THIS REVIEW

The OIG conducted interviews, fieldwork, and analysis for this review from March 2002 until March 2003. As noted above, we focused on two detention facilities, the MDC in Brooklyn, New York, and the Passaic County Jail in Paterson, New Jersey. We chose the MDC because it housed 84 aliens arrested in the aftermath of the September 11 terrorist attacks. In addition, the MDC received widespread media coverage for allegations of abuse against detainees and for the restrictive conditions of confinement it imposed on the detainees. We selected Passaic because it housed 400 aliens arrested in connection with the September 11 terrorism investigation – the most in any single facility – and, like the MDC, was the subject of many media articles regarding the treatment of detainees.

In this review, "September 11 detainees" are defined as aliens held on immigration violations in connection with the investigation of the September 11 attacks. The FBI categorized these aliens as either "of interest," "of high interest," or "of undetermined interest" to its terrorism investigation. The INS treated all three categories as "September 11 detainees," and sometimes referred to them as "special interest" or "of interest" detainees.[10]

As noted above, the Department detained 762 aliens on immigration charges in connection with its terrorism investigation between September 2001 and August 2002. From the total of 475 September 11 detainees held at the MDC and Passaic,[11] we selected a sample of 119 detainees – 53 held at the MDC and 66 confined at Passaic – to examine their detention experiences in detail.

Our MDC sample of 53 detainees was composed of 19 aliens who were being held at the facility during our site visit in May 2002; a random sample of 30 detainees previously held at the MDC but released or transferred prior to

[10] In this report we generally refer to all three FBI categories collectively as "of interest," unless otherwise noted.

[11] Nine September 11 detainees were held at both Passaic and the MDC.

our May 2002 visit; and 4 detainees whose experiences at the MDC were the subject of media articles.

Our Passaic sample of 66 detainees was composed of 30 aliens reportedly held at the facility immediately prior to our site visit in May 2002; a random sample of 30 detainees held at Passaic but released or transferred prior to our May 2002 visit; and 6 detainees whose detentions at Passaic were the subject of media articles.[12]

We interviewed 32 detainees in these sample groups – 19 housed at the MDC, 13 at Passaic – with their attorneys present if they requested. We also separately interviewed seven immigration attorneys who represented September 11 detainees held at the MDC or Passaic.

In addition, we reviewed the INS Alien Files (known as "A-Files") of 104 detainees from our sample of 119 September 11 detainees: 44 of the 53 detainees in our MDC sample and 60 of the 66 detainees in our Passaic sample.[13] The INS was unable to provide us with the remaining 15 A-Files for these detainees. At the MDC and Passaic, we also reviewed the facilities' records pertaining to the 119 detainees in our samples, including their administrative, disciplinary, and medical files. In addition, we reviewed available FBI Headquarters and FBI field office records for 54 September 11 detainees identified by the INS on January 23, 2002, as having been held longer than 90 days after receiving voluntary departure or removal orders.[14]

We also examined INS and BOP policies and procedures relating to immigration charging, conditions of confinement, and access to counsel. These included agency detention standards as well as specific policies applicable to the MDC and Passaic that were developed prior to and after the September 11 attacks. We focused on how the BOP and INS implemented these standards, and we examined the actions of managers at the Headquarters and local levels regarding their adherence to these policies. In particular, we examined the following documents during our analysis:

- A database maintained by the INS's Custody Review Unit (CRU) that contains extensive INS records of the investigative and litigation histories of the September 11 detainees;

[12] The INS provided us with a list of 30 September 11 detainees who were being held at Passaic in April 2002. However, when we conducted our site visit in May 2002, the INS had released or transferred 17 of the 30 detainees.

[13] The A-File, maintained by the INS, contains an alien's U.S. immigration history.

[14] See Chapter 6 for a discussion of final orders of removal.

- A second CRU-maintained database that depicts the detention history of each September 11 detainee;

- A document used by FBI Headquarters to track the status of the detainee clearance process;

- The list of September 11 detainees cleared of connections to terrorism by the FBI New York Field Office (this FBI office conducted clearance investigations on more than 500 of the 762 September 11 detainees);

- FBI Headquarters files for a sample of 54 September 11 detainees maintained by the unit that coordinated the detainee clearance process, as well as corresponding FBI field office files for 46 of those 54 detainees; and

- The BOP's list of September 11 detainees held at the MDC.

In addition, we conducted more than 50 interviews of officials at the FBI, INS, BOP, and the Department of Justice regarding their involvement in developing and implementing the policies concerning the apprehension, detainment, investigation, and adjudication of September 11 detainee cases. Among the officials we interviewed were the Attorney General, the Deputy Attorney General (DAG), the Associate Deputy Attorney General responsible for immigration issues, and various officials in their offices; the Assistant Attorney General for the Criminal Division and attorneys from the Criminal Division involved in the September 11 investigation; the INS Commissioner; the INS Executive Associate Commissioner for Field Operations, the INS General Counsel, and a variety of other INS attorneys and staff; the FBI Director, the former Deputy Director, General Counsel, and other FBI officials; the BOP Director, the BOP's Assistant Director for Correctional Programs, and other BOP attorneys and staff; and officials in the Department's Executive Office for Immigration Review (EOIR).[15] During our fieldwork at the MDC and Passaic, we interviewed the wardens, supervisors, correctional officers, medical staff, and other employees who had contact with or oversight of September 11 detainees. In addition, we interviewed managers and employees in the FBI's New York Field Office and Newark Field Office, the INS's New York and Newark District Offices, and the U.S. Attorney's Office for the Southern District of New York.[16]

[15] Throughout this report, most individuals are identified using the title they held at the time of the event or action under examination.

[16] Organization charts for the Department, FBI, INS, and BOP are attached at Appendix C.

During our review, we also met several times with representatives of Amnesty International and Human Rights Watch, who offered information and discussed their concerns about the treatment of aliens arrested after September 11. In addition, these organizations helped arrange interviews with some September 11 detainees or their attorneys. We also met with representatives from the American Civil Liberties Union, the Center for Constitutional Rights, the Islamic Circle of North America, and the Legal Aid Society.

III. ORGANIZATION OF THIS REPORT

This report is organized into ten chapters and begins with this introduction to the report. Chapter 2 describes the initial actions taken by the Department in Washington, D.C., and New York City that affected the arrest, detention, and investigation of the September 11 detainees. It discusses demographic statistics on the September 11 detainees, including their age, citizenship, location, and date of arrest. It also describes the procedure used by the FBI, INS, and BOP to review and process aliens detained on immigration charges in connection with the Department's terrorism investigation.

Chapter 3 discusses the charging of September 11 detainees with immigration violations. We identify policies, procedures, and issues that affected the timely charging of the detainees.

Chapter 4 examines the development and implementation of the Department's "hold until cleared" policy for September 11 detainees. It describes a series of operational orders issued by INS Headquarters to manage September 11 detainees. It also examines the processes implemented by the FBI to clear detainees of any connection to terrorism and the ramifications of this procedure on the detainees' length of confinement. We discuss why the FBI New York Field Office and INS New York District Office initially developed a separate list of September 11 detainees unbeknownst to FBI and INS Headquarters officials and the problems this presented. In addition, we describe the impact caused by the Department's decision to require Central Intelligence Agency (CIA) name checks for each of the detainees. The chapter ends with an examination of the FBI's development of a "watch list" and its process for adding and removing names from that list.

Chapter 5 begins with basic information about federal immigration law, including the charging procedure for immigration violations, bond hearings, and removal proceedings.[17] It then examines the Department's opposition to

[17] The 1996 amendments to the immigration laws combined "deportation" and "exclusion" proceedings into "removal" proceedings. In this report, we use the term "removal (cont'd)

bond for September 11 detainees and the INS's efforts to keep detainees in custody.

Chapter 6 discusses detainees with final removal and voluntary departure orders, the Department's decision to prevent removal of September 11 detainees until they were cleared by the FBI, and the eventual rescission of the policy. The chapter concludes with a review of the INS's compliance with a requirement that it conduct a review of the continued detention of aliens held for 90 days after they received removal orders.

Chapters 7 and 8 examine the conditions of confinement experienced by September 11 detainees at the MDC and Passaic facilities. Chapter 7 evaluates conditions at the MDC, including allegations of physical and verbal abuse, access to legal counsel, medical care, recreation, and other issues. Chapter 8 examines similar issues for September 11 detainees confined at Passaic.

In Chapter 9, we offer a series of recommendations to address the issues discussed in this report. Chapter 10 provides our conclusions. The 11 Appendices contain a glossary of names (Appendix A) and terms (Appendix B), organization charts, various memoranda, and sample INS forms.

proceedings" to refer to all proceedings that sought to deport, exclude, or remove aliens from the United States.

CHAPTER TWO

ARREST AND PROCESSING OF ALIENS IN RESPONSE TO THE SEPTEMBER 11 ATTACKS

This chapter describes the Department's initial response to the terrorist attacks. First, we examine the immediate actions taken by the FBI and INS in New York City to arrest and detain aliens in connection with the terrorism investigation. Next, we describe the Department's philosophy as it related to aliens arrested in connection with the terrorism probe, and we discuss some of the processes developed at FBI and INS Headquarters to coordinate information about these detainee cases. We also provide demographic statistics about the September 11 detainees. In addition, we describe the system used by the FBI, INS, and BOP to review and process aliens detained on immigration charges in connection with the terrorism investigation.

I. INITIAL LAW ENFORCEMENT RESPONSE

A. Initial FBI Response

The FBI took the lead in investigating the September 11 attacks, an investigation that became known as the Pentagon/Twin Towers Bombings investigation, or PENTTBOM. The FBI's investigation initially was affected by the chaotic situation in New York City as a result of the terrorist attacks, which displaced thousands of people from their homes and offices in lower Manhattan. As a result of the attacks, the FBI was forced to evacuate its New York City office in the Javits Federal Building at 26 Federal Plaza, seven blocks from what became known as "Ground Zero." Similarly, the INS was forced to evacuate all detainees housed at its Service Processing Center at 201 Varick Street in Manhattan's lower West Side.[18]

The FBI's focus immediately after the attacks was whether any of the airplanes remaining in the air posed a threat. Once air traffic over the United States had ceased completely, the FBI turned its attention to locating those responsible for the terrorist attacks and preventing future attacks. During the evening of September 11, the FBI New York Field Office moved telephones, computers, facsimile machines, and other equipment into a temporary command post in a parking garage [redacted]. In addition to the [redacted] site, the FBI created command posts [redacted]

[18] INS Service Processing Centers process and detain illegal aliens who are awaiting disposition of their immigration cases or awaiting removal from the country. A detainee could be held at a Service Processing Center from one day to several years.

[redacted] near midtown Manhattan and at FBI offices in Queens and Long Island, New York.

With the help of the airlines and the INS, the FBI quickly determined the names used by the hijackers and immediately began to pursue leads related to them. During this initial period, the overall terrorism investigation was coordinated from the FBI's high-security Strategic Information and Operations Center (SIOC) located at FBI Headquarters in Washington, D.C. The FBI Headquarters in Washington, D.C. coordinated the New York aspects of the terrorism investigation through the FBI's New York Joint Terrorism Task Force (JTTF), a group composed of a variety of law enforcement agencies including the INS, the New York Police Department, and the Drug Enforcement Administration.[19] In addition, prosecutors from the U.S. Attorney's Office for the Southern District of New York (SDNY) and the Eastern District of Virginia, in conjunction with the Department's Criminal Division, worked closely with the New York JTTF to direct major aspects of the terrorism investigation from both Washington, D.C., and New York City.

The day after the attacks, officials at FBI Headquarters began developing a "watch list" that initially was designed to identify potential hijackers and other individuals who might be planning additional terrorist acts once air travel resumed. By September 14, the FBI had forwarded the watch list, which at this point contained more than 100 names, to the Federal Aviation Administration, commercial airlines, FBI field offices, the U.S. Border Patrol, the U.S. Customs Service, and 18,000 state and local police departments across the country. According to FBI Director Robert Mueller, the watch list ultimately contained the names of "individuals the FBI would like to talk to because we believe they have information that could be helpful to the [PENTTBOM] investigation."[20]

The FBI allocated massive resources to the September 11 terrorism investigation. Within 3 days of the attacks, more than 4,000 FBI special agents and 3,000 support personnel were assigned to work on the PENTTBOM probe. Six days after the attacks, FBI Director Mueller reported that more than 500

[19] Each of the FBI's 56 domestic field offices now leads a JTTF in its respective geographic area of responsibility. The FBI's New York Division formed the first JTTF in 1980. Participants in JTTFs include the INS; U.S. Secret Service; Naval Criminal Investigative Service; U.S. Marshals Service; U.S. Customs Service; Bureau of Alcohol, Tobacco, and Firearms; U.S. Department of State/Diplomatic Security Service; Offices of Inspectors General; Postal Inspection Service; Internal Revenue Service; Department of Interior Bureau of Land Management; Air Force Office of Special Investigations; U.S. Park Police; Federal Protective Service; Defense Criminal Investigative Service; and other federal, state, and local law enforcement agencies.

[20] FBI Director Robert Mueller, Press Conference at FBI Headquarters (September 14, 2001). We discuss the development and eventual dissolution of this watch list in greater detail in Chapter 4.

people representing 32 federal, state, and local law enforcement agencies were working 24 hours a day at FBI Headquarters. By September 18, 2001, 1 week after the attacks, the FBI had received more than 96,000 tips or potential leads from the public, including more than 54,000 through an Internet site it established for the PENTTBOM case, 33,000 that were forwarded directly to FBI field offices across the country, and another 9,000 tips called into the FBI's toll-free "hotline."

B. Department of Justice Response

In response to the September 11 attacks, the Attorney General directed all Department of Justice components to focus their efforts on disrupting any additional terrorist threats. As articulated in a September 17, 2001, memorandum to all United States Attorneys from Attorney General Ashcroft, the Department sought to prevent future terrorism by arresting and detaining violators who "have been identified as persons who participate in, or lend support to, terrorist activities. Federal law enforcement agencies and the United States Attorneys' Offices will use every available law enforcement tool to incapacitate these individuals and their organizations." Given the identities of the September 11 terrorists, the Department recognized from the earliest days that its terrorism investigation had a significant immigration law component.

The Attorney General summarized the Department's new focus in a speech he gave to the U.S. Conference of Mayors on October 25, 2001:

> Forty years ago, another Attorney General was confronted with a different enemy within our borders. Robert F. Kennedy came to the Department of Justice at a time when organized crime was threatening the very foundations of the Republic...
>
> Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.
>
> Let the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.
>
> In the war on terror, this Department of Justice will arrest and detain any suspected terrorist who has violated the law. Our single objective is to prevent terrorist attacks by taking suspected terrorists off the

> street. If suspects are found not to have links to terrorism or not to have violated the law, they are released. But terrorists who are in violation of the law will be convicted, in some cases deported, and in all cases prevented from doing further harm to Americans.

The Attorney General told the OIG that he instructed that if, during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the September 11 attacks.

The Deputy Attorney General explained to the OIG that the threat presented by terrorists who carried out the September 11 attacks required a different kind of law enforcement approach. He stated that the Department needed to disrupt such persons from carrying out further attacks by turning its focus to prevention, rather than investigation and prosecution.

Michael Chertoff, the Assistant Attorney General for the Criminal Division, told the OIG that within days of the attacks it became evident that some aliens encountered in connection with the PENTTBOM investigation were "out of status" in violation of the law – a matter that fell within the jurisdiction of the INS. He stated the Department's policy was to "use whatever means legally available" to detain a person linked to the terrorists who might present a threat and to make sure that no one else was killed. In some instances, he noted, that would mean detaining aliens on immigration charges, and in other cases criminal charges. Chertoff said he did not believe that the Department had a blanket policy to go with one or the other, if both were possible. He said he understood the Department would use whichever charge was most "efficacious." He stated that he was involved in meetings with the Attorney General, the Deputy Attorney General, and the FBI Director at which this philosophy was discussed, but he added that, from the beginning, there was an insistence from senior Department officials that things be done legally. Chertoff explained that his deputy, Alice Fisher, was placed in charge of immigration issues for the Criminal Division.

Fisher told the OIG that during the fall of 2001 she spent the "majority" of her time on terrorism issues, some of which involved illegal aliens who presented a potential terrorism threat. She recalled that Chertoff told her "we have to hold these people until we find out what is going on." She said she understood that the Department was detaining aliens on immigration violations that generally had not been enforced in the past.

C. New York FBI's Response

The FBI Field Office in New York City and its JTTF received thousands of leads from the public related to terrorism in the weeks after September 11. Staff at the New York JTTF command post entered the leads into an FBI

database that assigned each PENTTBOM lead a unique number. Leads then were sent to one of the four FBI command posts in the New York City area and assigned to a JTTF team that included FBI and INS agents, among other law enforcement personnel.

Many of the leads pursued by the JTTF in New York City and elsewhere across the country involved aliens, many from countries with large Arab or Muslim populations. If JTTF teams in New York encountered an illegal alien in the course of pursuing a PENTTBOM lead – whether or not the alien was the subject of the lead – the INS agent on the team examined the alien's immigration and identity documents to determine whether the alien was lawfully in the United States. If an INS agent was not present during the JTTF's initial interview of the individual, the team notified the INS New York District Office, which dispatched an INS agent to determine the alien's immigration status. The team would arrest any alien encountered in the course of investigating a JTTF or PENTTBOM lead who was found to be in the country illegally.

Many of the aliens arrested under these circumstances were put into a special category referred to as persons "of interest" to the FBI. Their names were placed on a list referred to as "the INS Custody List." The INS and FBI did not always agree on which aliens should be included on the list, and we found that the cases were not handled uniformly nationwide. The complexities of how a person came to be included in this special category of immigration detainees is discussed in detail in Chapter 4, where we also examine some of the problems that arose from creation of this category of detainees. Moreover, as we describe later in this report, being labeled "of interest" had significant ramifications for the detainees' place and length of detention. The Department severely limited these detainees' ability to obtain bond, and detainees on this list could not be removed from the United States without a written "clearance letter" from the FBI. These requirements created substantial obstacles for detainees who sought release or removal. We describe these issues in more detail in the chapters that follow.

In conjunction with the New York FBI's JTTF, the U.S. Attorney's Office for the SDNY immediately began to investigate the terrorist attacks. David Kelley, the Deputy United States Attorney for the SDNY, helped direct the search warrants, subpoenas, and material witness warrants in the Southern District and also participated in the supervision of the PENTTBOM task force in Washington, D.C. Within one to three days after the attacks, Kelley explained, he focused on individuals "really" of "investigative interest" (as opposed to those simply labeled "special interest" by the FBI or the INS). He explained that individuals of "genuine investigative interest" were people connected to a subject or target of the investigation, such as a person whose telephone number was linked to a hijacker, or a person who lived in a building near a location of high interest.

D. SIOC Working Group

Within one week of the attacks, a group was established by Deputy Assistant Attorney General Alice Fisher to coordinate efforts among the various components within the Department that had an investigative interest in or responsibility for the September 11 detainees. This group became known as the "SIOC Working Group" because its initial meetings took place in the FBI's SIOC. In addition to the FBI, the Working Group included staff from the INS; the Department's Office of Immigration Litigation (OIL); the Terrorism and Violent Crime Section (TVCS) of the Department's Criminal Division, which reported directly to Fisher; and the Office of the Deputy Attorney General.[21]

The SIOC Working Group met daily during the first months after the attacks, and sometimes multiple times within a single day. As one of its duties, the group coordinated information and evidence sharing among the FBI, INS, and U.S. Attorneys' offices related to the September 11 detainees. As discussed in detail in Chapter 4, the group sought to ensure that aliens detained as part of the PENTTBOM investigation would not be released until they were cleared by the FBI of involvement with the September 11 attacks or terrorism in general. FBI participants from its Office of General Counsel assisted in preparing affidavits to support INS opposition to bond for these detainees, while FBI agents coordinated with FBI field offices to obtain information regarding clearance investigations for detainees. INS attorneys on the SIOC Working Group served as a link to INS Headquarters and its field offices. The assessments of individual detainee cases communicated by the FBI to the INS at the SIOC Working Group, as we describe later, had a significant impact on detainees' ability to obtain bond or be removed from the United States.

The FBI created an "INS Detainee Unit" in October 2001 located in the SIOC to handle detainee cases. This group, staffed by FBI special agents and others from the FBI Counterterrorism Division, worked closely with the SIOC Working Group to handle detainee matters.

II. ARRESTS OF SEPTEMBER 11 DETAINEES

For the most part, the 762 aliens classified as September 11 detainees were arrested by FBI-led terrorism task forces pursuing investigative leads and were held on valid immigration charges.[22] These leads ranged from information

[21] OIL is the unit within the Department's Civil Division that handles immigration litigation, while TVCS assists federal prosecutors nationwide in prosecuting terrorism cases.

[22] We found one instance in which a September 11 detainee was held for over 72 hours before being released, despite the fact that there was no valid immigration charge.

obtained from searches of the hijackers' cars and personal effects to anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules.

In New York, the JTTF moved aggressively to pursue the thousands of PENTTBOM leads that poured into the FBI in the days and weeks after the terrorist attacks. Witnesses both inside and outside the FBI told us that given the wide-ranging nature of the terrorism probe, the FBI interpreted and applied the term "of interest to the September 11 investigation" quite broadly. For example, a supervisory special agent in the FBI's New York Field Office who was in charge of the unit responsible for detainee clearance investigations told the OIG that if JTTF agents searching for a particular person on a PENTTBOM lead arrived at a location and found a dozen individuals out of immigration status, each of them were considered to be arrested in connection with the PENTTBOM investigation. He said no distinction generally was made between the subjects of the lead and any other individuals encountered at the scene "incidentally," because the FBI wanted to be certain that no terrorist was inadvertently set free. Consequently, he said all of the aliens in the above situation would be arrested on immigration charges and treated as "of interest" to the September 11 investigation because there was no way to tell who might be an associate of the subject of the lead.

PENTTBOM leads that resulted in the arrest of a September 11 detainee often were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant. For example, several Middle Eastern men were arrested and treated as connected to the September 11 investigation when local law enforcement authorities discovered "suspicious items," such as pictures of the World Trade Center and other famous buildings, during traffic stops. Similarly, local police stopped three Russian tourists because they were observed photographing "sensitive" locations in New York City, such as the Holland Tunnel. Another man was arrested on immigration charges and labeled a September 11 detainee when authorities discovered that he had taken a roll of film to be developed and the film had multiple pictures of the World Trade Center on it but no other Manhattan sites. This man's roommates also were arrested when law enforcement authorities found out they were in the United States illegally, and they too were considered September 11 detainees.

September 11 detainees and other witnesses interviewed by the OIG provided additional examples of how some aliens were arrested and labeled "September 11 detainees," including:

- Shortly before the September 11 attacks, an alien from [redacted], who worked at a [redacted], struck up a conversation with a [redacted] who paid for a purchase using an aviation-related credit card. During the conversation, the alien allegedly told the [redacted] that he would

like to learn how to fly an airplane. After the September 11 attacks, the [redacted] called the FBI and recounted his conversation with the [redacted]. The INS subsequently arrested the alien when it determined he was out of immigration status, and he was considered a September 11 detainee.

- Another alien treated as a September 11 detainee was arrested at his apartment in [redacted] a few days after a caller told the FBI that "two Arabs" rented a truck from his [redacted] vehicle rental business on September [redacted] for a one way trip to a [redacted] city, and then returned it [redacted] minutes later having gone only [redacted] miles. They were, according to the caller, "extremely nervous," and did not argue when told they would not be refunded the hundreds of dollars they had paid for the rental.

- Another alien was arrested, detained on immigration charges, and treated as a September 11 detainee because a person called the FBI to report that the [redacted] grocery store in which the alien worked, "is operated by numerous Middle Eastern men, 24 hrs – 7 days a week. Each shift daily has 2 or 3 men. . . . Store was closed day after crash, reopened days and evenings. Then later on opened during midnight hours. Too many people to run a small store."

III. ASSIGNMENT TO A DETENTION FACILITY

Our review determined that September 11 detainees arrested in New York City generally were confined at the MDC or transported to Passaic and other INS contract facilities in northern New Jersey. The housing determination for a September 11 detainee was the result of a two-step process that began with the FBI's assessment of the detainee's possible links to terrorism. The FBI provided this assessment to the INS, which made the actual housing determination. Witnesses told the OIG that the INS's determination was based almost solely on the FBI's assessment.

Where a September 11 detainee was housed had significant ramifications on the detainee's detention experiences. Detainees housed at the MDC (discussed in Chapter 7) experienced much harsher confinement conditions than those held at Passaic (discussed in Chapter 8). The September 11 detainees held at the MDC were locked down 23 hours a day, were placed in four-man holds during movement, had restricted phone call and visitation privileges, and had less ability to obtain and communicate with legal counsel.

A. FBI Assessment

The first part of the process to determine where a September 11 detainee would be confined began with the FBI's initial assessment of the detainee's

links to the PENTTBOM investigation or ties to terrorism. The FBI assessed a detainee as "high interest," "of interest," or "interest undetermined." The "high interest" detainees were considered by the FBI to have the greatest potential to be linked to the PENTTBOM investigation or to terrorism. The FBI believed the "of interest" detainees might have some terrorist connections. For the "interest undetermined" detainees, the FBI could not affirmatively state that the detainee did not have a connection to the September 11 attacks. As we discuss in Chapter 4, this assessment was not based on specified criteria or consistently applied to all detainees. In addition, the INS was not authorized to release a September 11 detainee until the FBI completed its clearance investigation because of the concern about inadvertently releasing a terrorist. Therefore, the FBI in New York City never labeled a detainee "no interest" until after the clearance process was complete.

Almost all the September 11 detainees in our review were arrested by the INS. Often an FBI agent present at the arrest provided the INS with a verbal assessment of the FBI's level of interest in the particular detainee. However, we found that this initial assessment often was based on little or no concrete information tying the detainee to the September 11 attacks or terrorism.

B. INS Housing Determination

After the INS arrested September 11 detainees, they were taken to an immigration processing center, such as the INS's Service Processing Center on Varick Street in New York City, to complete arrest and initial detention processing (after the attacks the Center no longer housed detainees, but remained open for processing). The FBI New York Field Office identified its level of investigative interest in the detainee to the FBI's International Terrorism Operations Section (ITOS) at FBI Headquarters, which informed, usually verbally, the INS's National Security Unit (NSU). The information passed to the NSU by the FBI included a request that detainees of "high interest" be housed at the MDC.

From September 11 to 21, 2001, INS Executive Associate Commissioner for Field Operations Michael Pearson made all decisions regarding where to house September 11 detainees. According to Daniel Cadman, the NSU Director, NSU staff provided briefings to Pearson that consisted of the FBI's assessments, other derogatory information obtained during the investigation (if any), and the security risk posed by the detainee (if known). Based on this information, Pearson decided whether a detainee should be confined at a BOP facility (such as the MDC), an INS facility, or an INS contract facility (such as Passaic). Pearson's decision was relayed to the INS New York District, which transferred the detainees to the appropriate facility.

The INS's housing determination process changed on September 21, 2001, when the INS created the Custody Review Unit (CRU) at Headquarters

and appointed three INS District Directors to make detainee housing determinations based on input provided by the FBI. At this point, Pearson removed himself from this decision-making process.

We were also told that some detainee housing determinations were made outside the process described above. Dan Molerio, Assistant District Director for Investigations in the INS New York District, said three Assistant U.S. Attorneys from the Southern District of New York detailed to the FBI Headquarters contacted him on a number of occasions and identified "high interest" detainees held by the INS in New York. Molerio said the FBI's Assistant Special Agent in Charge for Counterterrorism in New York also called him on several occasions about "high interest" detainees. Molerio said when the FBI told him a detainee was "high interest," he would ensure that the detainee was sent to the MDC.

In sum, even though the INS established a process for making housing determinations, the INS's decision was based almost entirely on the FBI's assessment.

C. BOP Confinement Decisions

Soon after the September 11 attacks, the BOP made several decisions regarding the detention conditions it would impose on the September 11 detainees. These decisions (discussed in more detail in Chapter 7) included housing the detainees in the administrative maximum (ADMAX) Special Housing Unit (SHU), implementing a communications blackout, and classifying the detainees as Witness Security (WITSEC) inmates. According to Michael Cooksey, the BOP's Assistant Director for Correctional Programs, the BOP decisions were based on the BOP's concerns about potential security risks posed by the September 11 detainees. He said the BOP made the decision to impose strict security conditions in part because the FBI provided so little information about the detainees and because the BOP did not really know whom the detainees were. He said the BOP chose to err on the side of caution and treat the September 11 detainees as high-security detainees. He said that the Department was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities. Cooksey said the BOP did not treat the September 11 detainees different than "regular" high-security inmates.

BOP Director Kathy Hawk Sawyer told the OIG that officials in the Deputy Attorney General's Office contacted her to discuss specific detainees' ability to communicate with other inmates and with the outside world. She said she understood from these conversations that the Department wanted the

BOP to limit, as much as possible within their lawful discretion, the detainees' ability to communicate with other inmates and with people outside the MDC.[23]

D. Department of Justice's Role

Witnesses told us that the Department of Justice had little input into where the detainees were held. For example, Chertoff, the Assistant Attorney General in charge of the Criminal Division, said he did not have any information about where or how the detainees would be held, with the exception of one conversation in which he was told that an alien had claimed he was hurt by a guard. He said that he was later told that the report was inaccurate, and that the alien had not made such an accusation. David Israelite, Deputy Chief of Staff to the Attorney General, said he could not recall any discussions of holding people "incommunicado" or any discussion of where detainees should be held. He also recalled one allegation of mistreatment being called to the attention of the Attorney General, who he said asked staff to look into the incident.

Alice Fisher, the Deputy Assistant Attorney General who was in charge of terrorism issues for the Criminal Division, stated that she had no information about which facility a detainee would go to or the conditions that would be imposed on the detainees. She noted that there was an "effort" to accommodate the needs of the Assistant U.S. Attorneys who were conducting the grand jury investigation into the attacks. David Kelley, the Deputy U.S. Attorney for the SDNY who played an important role in the September 11 investigation, said he had no input into where people would be confined, except that a person might be moved to the New York area if he was needed to testify. An Assistant U.S. Attorney from the SDNY who worked on the terrorism investigation explained that he generally did not have input into where detainees would be held. He recalled being frustrated that the BOP did not distinguish between detainees who, in his view, posed a security risk and those detained aliens who were uninvolved witnesses.

IV. DEMOGRAPHICS OF SEPTEMBER 11 DETAINEES

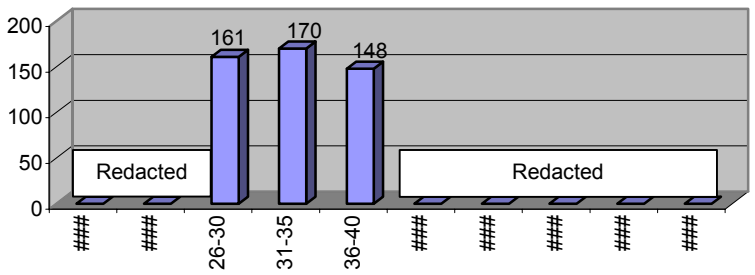
The 762 September 11 detainees we reviewed were almost exclusively men, [redacted].

[23] We discuss Hawk Sawyer's conversations with Christopher Wray, Principal Associate Deputy Attorney General, and David Laufman, Chief of Staff to the Deputy Attorney General, in Chapter 7.

The age of the detainees varied, although most, 479 (or 63 percent), were between 26 and 40 years old. However, many of the detainees were much older. [redacted]

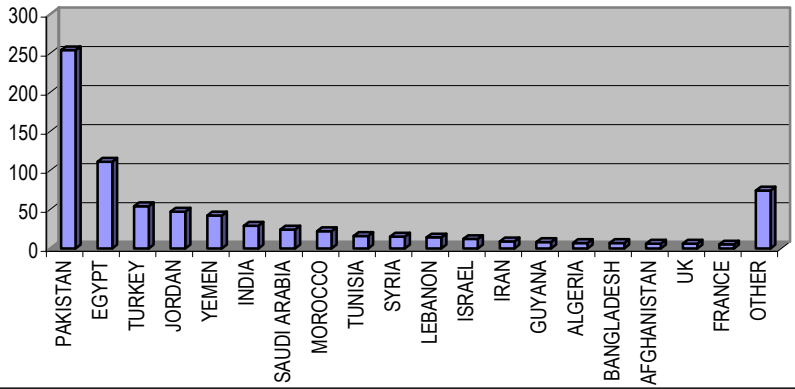
See Figure 1.

Figure 1
Age Ranges for the September 11 Detainees



The September 11 detainees were citizens of more than 20 countries. The largest number, 254 or 33 percent, came from Pakistan, more than double the number of any other country. The second largest number (111) came from Egypt. Nine detainees were from Iran and six from Afghanistan. In addition, 29 detainees were citizens of Israel, the United Kingdom, and France. See Figure 2.

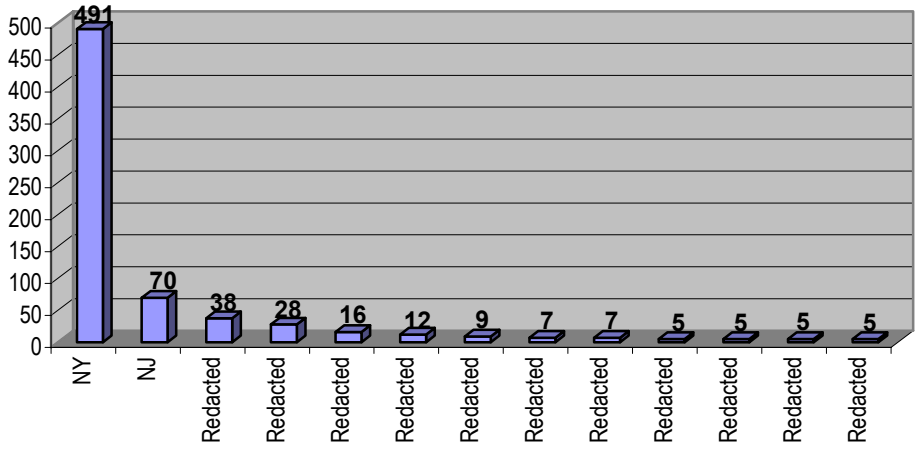
Figure 2
Nationality of September 11 Detainees



The arrest location of a September 11 detainee proved significant because it determined which FBI field office had responsibility for, among other things, investigating the detainee for any connections to terrorism (the "clearance process" that we examine in detail in Chapter 4). By far the

majority of detainees were arrested in New York (491 of 762, or 64 percent), followed by New Jersey with 70 detainee arrests, [redacted] with 38, [redacted] with 28, and [redacted] with 16. See Figure 3.

Figure 3
Arrest Location of September 11 Detainees



The timing of detainee arrests shows that 658 detainees (86 percent) were arrested in the first 3 months after the terrorist attacks. See Figures 4 and 5 for information on the numbers of September 11 detainees arrested by week and month. The most detainees arrested in a single week – 85 – were arrested during the week after the September 11 attacks.

Figure 4
September 11 Detainee Arrests (By Week)

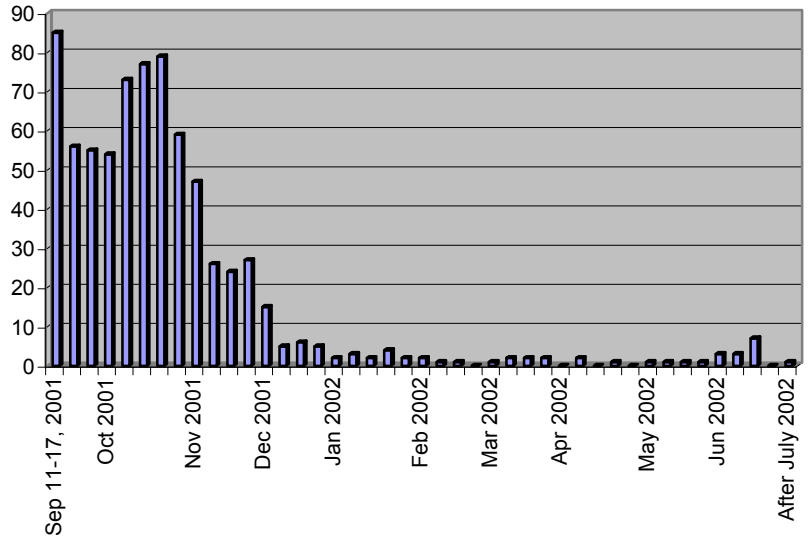
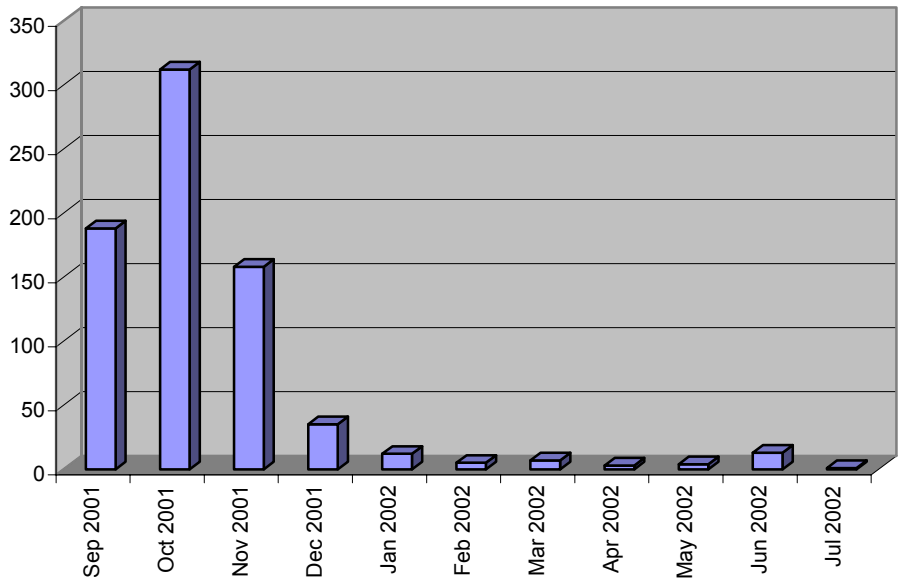


Figure 5
September 11 Detainee Arrests (By Month)*



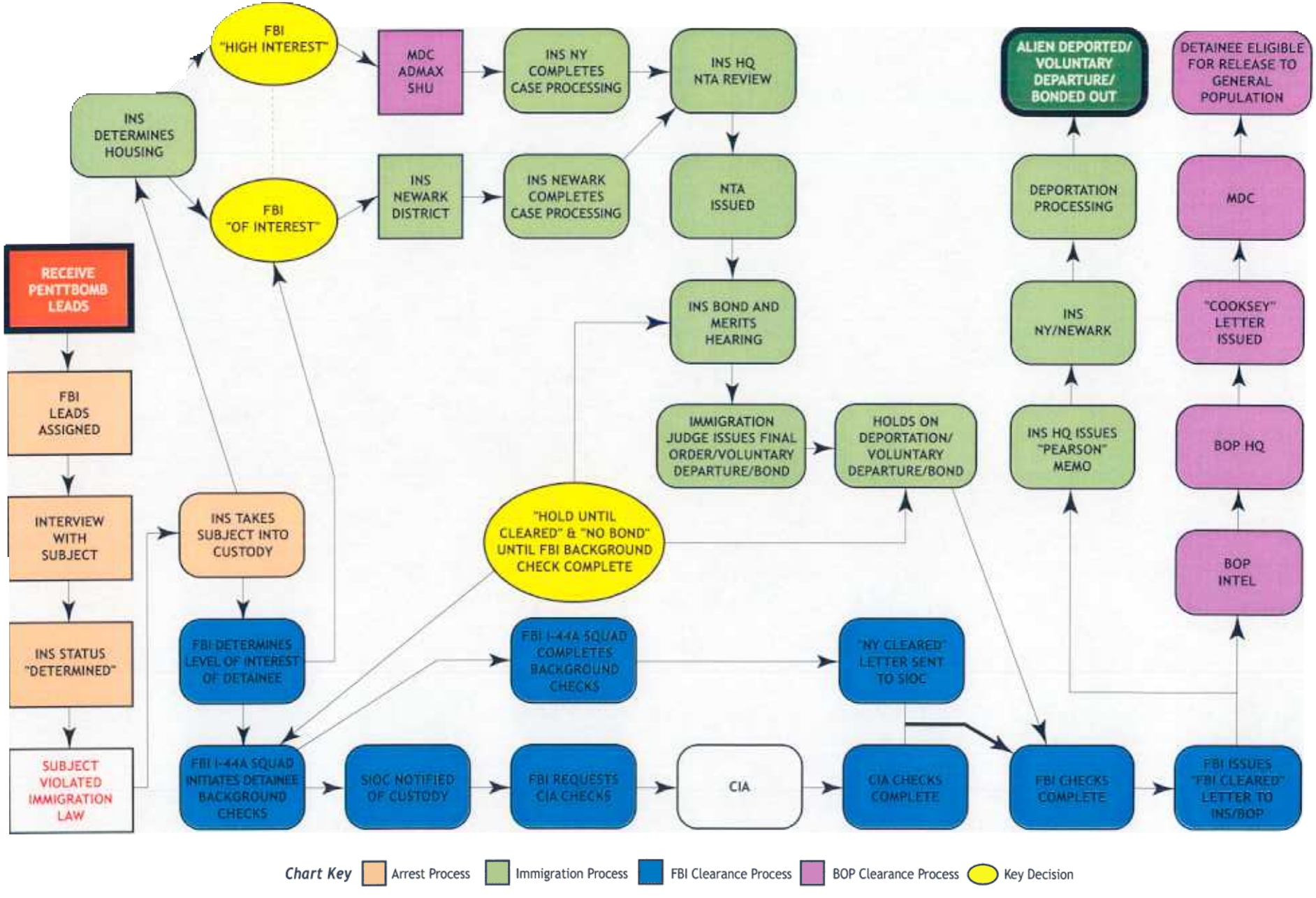
* Detainee arrest data for the month of September 2001 is as of September 11, 2001.

V. PROCESSING OF SEPTEMBER 11 DETAINEES FROM ARREST TO CLEARANCE

Perhaps the factor that most significantly affected the length of a September 11 detainee's confinement was the nature of the multi-step, multi-agency process used by the Department for handling aliens detained as part of its terrorism investigation. The OIG developed the following flow chart (Figure 6) to depict the process for handling September 11 detainees from their initial encounter with law enforcement authorities through their release from custody or removal from the United States. The chart displays the process used by the Department to investigate PENTTBOM leads, arrest September 11 detainees, determine where to house them, conduct detainee clearance investigations, complete the INS hearings and removal proceedings, and remove the detainees.[24]

[24] The chart depicts the process for September 11 detainees held at the MDC or Passaic. Some detainees only went through part of this process, depending on their individual immigration cases and the progress of their FBI clearance checks. The "BOP Process" shown in the chart applied only to those detainees housed at the MDC.

Processing September 11 Detainees from Arrest to Clearance – New York Region



The following steps describe the procedures depicted by this chart:

Arrest Process:

1. U.S. law enforcement received information regarding an individual who may have connections to the September 11 attacks or terrorism in general (a PENTTBOM lead).

2. If deemed worthy of investigation, the responsible FBI field office assigned the lead for investigation (in New York City, generally to the JTTF).

3. Law enforcement personnel interviewed the individual, and an INS agent determined his immigration status. The subject was released if the FBI expressed no investigative interest related to the terrorism probe and the individual had not violated his immigration status.

4. If the INS agent determined that the alien was in violation of immigration status, the INS agent took the alien into custody and asked the FBI for an assessment of its interest in the alien with respect to the terrorism investigation.

5. The FBI determined its level of interest in the alien: generally "of interest," "high interest," "no interest," or "undetermined." Based on this assessment by the FBI, "high interest detainees" were sent to BOP high-security facilities, while "of interest" and "interest unknown" detainees generally were housed in less restrictive facilities, such as county jails under contract to the INS.

FBI Clearance Process:

1. After the FBI received the detainee's A-File from the INS, the FBI initiated detainee clearance investigations and notified the SIOC Working Group that the alien was in custody. The Department had issued a standing order that detainees were not to be released until clearance investigations were completed.

2. The SIOC Working Group requested CIA checks on the detainee.

3. If clearance investigations and CIA checks on the detainee were clear, the detainee was determined to be of "no interest" to the FBI.

4. The FBI's ITOS decided the final clearance of a September 11 detainee and issued a formal FBI clearance letter, signed by the ITOS Section Chief. Until the FBI issued the clearance letter, the Department did not allow the INS to remove the detainee.

5. The SIOC Working Group forwarded the FBI clearance letter to the INS or BOP, whichever agency was holding the alien. If the BOP was holding the alien, BOP Headquarters then issued its clearance memorandum to the BOP facility, called a "Cooksey memorandum," notifying the appropriate warden that a detainee was eligible for release into the facility's general population.[25]

INS Immigration Process:

1. After INS Headquarters review, the INS District Director in the INS district where the September 11 detainee was arrested issued the charging document to the detainee (known as the "Notice to Appear" or NTA) that describes the immigration laws the detainee has allegedly violated. The INS initially held all September 11 detainees without bond, but the detainees were able to request bond re-determination hearings before an Immigration Judge after receiving the NTA and accompanying documents.

2. An Immigration Judge conducted a hearing on the detainee's alleged immigration violations (a "merits hearing") to determine whether the detainee should be removed from the United States.

3. The Immigration Judge issued a final order removing the detainee or permitting the detainee to leave the country voluntarily.

4. INS Headquarters issued its clearance memorandum – known as the "Pearson memorandum" – to the appropriate INS Region Office.[26] Issuance of the INS clearance letter was predicated on the INS receiving a clearance letter from the FBI stating that it had "no interest" in the detainee, as described above.

5. The alien was either removed from the United States, allowed to depart voluntarily, or released from INS custody.

The impact of each of these procedures on the length of the September 11 detainees' detentions and their conditions of confinement is discussed in detail in the chapters that follow.

[25] Cooksey memoranda were signed by Michael Cooksey, the BOP Assistant Director for Correctional Programs.

[26] Pearson memoranda were signed by Michael Pearson, then the INS Executive Associate Commissioner for Field Operations.

CHAPTER THREE

CHARGING OF SEPTEMBER 11 DETAINEES

The INS arrested hundreds of aliens in New York City and across the country in the aftermath of the September 11 terrorist attacks, most often while working as part of a Joint Terrorism Task Force. While some of these arrests resulted in criminal charges, the vast majority of September 11 detainees were charged with civil violations of federal immigration law, including: 1) staying past the expiration date on their visas, 2) entering the country without inspection, or 3) entering the country with invalid immigration documents.

Service of the charging document by the INS – called the "Notice to Appear" or NTA – provided the detainees with their first clear description of the charges they faced. Because the Department initially opposed bond for all September 11 detainees, service of the NTA and associated documents provided detainees their first opportunity to seek release by requesting a bond re-determination hearing before an Immigration Judge.[27]

In this chapter, we examine the INS's provision of NTAs for September 11 detainees held on immigration violations. We also identify the policies, procedures, and timeliness of the INS's charging decisions, and we examine reasons for the delay in charging experienced by some detainees. In addition, we discuss efforts by officials at INS Headquarters to review and approve charging documents for all September 11 detainees and the impact this Headquarters review had on the timely serving of NTAs and associated documents.

I. INS REGULATIONS AND POLICIES GOVERNING THE TIMING OF CHARGING DECISIONS

A. The Charging Determination

After an alien is arrested, the INS must decide whether to charge the alien with violating federal immigration law.[28] If the INS decides that

[27] A blank NTA form is attached at Appendix D.

[28] Section 236A of the Patriot Act provides that the Attorney General may "certify" an alien if he has "reasonable grounds to believe" that the alien has violated any of the enumerated immigration provisions (all of which relate to terrorism, espionage, or national security), or if the Attorney General has "reasonable grounds to believe" that the alien "is engaged in any other activity that endangers the national security of the United States." Any (cont'd)

immigration charges are warranted, it initiates a removal proceeding by serving the NTA on the alien and the Immigration Court. The NTA must include the alien's specific acts or conduct alleged to be in violation of the law. While an INS agent arrests the alien, an INS District Director, or his designee, makes the charging determination.[29]

Prior to the September 11 attacks, the INS was required by federal regulation to make this charging determination within 24 hours of arresting an alien. See 8 C.F.R. § 287.3(d). Within days of the September 11 attacks, the INS found that meeting this 24-hour timetable would be difficult, given the number of aliens arrested and the prospects of significantly more alien arrests.

As a result, on September 17, 2001, the Department issued a new regulation that changed the time by which the INS had to make the charging determination to 48 hours after the alien's arrest.[30] The revised regulation contains an exception to this 48-hour rule (an exception not contained in the previous version), which provides that, in the event of an emergency or other extraordinary circumstances, the charging decision could be made within an additional reasonable period of time. The regulation does not define "extraordinary circumstances" or "reasonable period of time." It is important to note that the regulation contains no requirement with respect to when the INS must notify the alien or the Immigration Court about the charges – that is, when the NTA must be served on the alien. The regulation only addresses the timing of when the INS must make its charging determination. The INS does not record the date or time the charging determination is made.

B. Serving the Notice to Appear (NTA)

Once the INS makes the decision to charge an alien with an immigration violation, it serves the NTA on the alien and the Immigration Court in the

alien certified under the section must be taken into custody. If the certified alien is not placed in removal proceedings or criminally charged within seven days of his detention, the statute instructs the Attorney General to release the alien. An alien detained solely under this section who has not been removed within the initial 90-day removal period and "whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." INA § 236A(a)(6). As of March 26, 2003, no alien had been certified by the Attorney General under these provisions.

[29] In criminal cases, defendants must be brought before a magistrate no later than 48 hours after arrest for a probable cause determination, except in exceptional circumstances. See Riverside v. McLaughlin, 500 U.S. 44 (1991). In the immigration context, the INS District Director makes this "probable cause" determination.

[30] 8 C.F.R. § 287.3.

jurisdiction where the alien is confined.[31] The NTA must be served on the alien in person where practicable, but also may be served by mail.

According to the INS General Counsel's Office, no statute or regulation explicitly states when the INS must serve the NTA on the alien or the Immigration Court. However, prior to the September 11 attacks, the INS's general practice was to serve the NTA on aliens within 48 hours of their arrests. According to Michael Rozos, Chief of the Long Term Review Branch in the INS's Office of Detention and Removal, after September 11 the INS established a goal of serving NTAs on aliens within 72 hours of arrest. Rozos said this goal was not established by regulation, but rather was based on "commonly recognized" INS practice. The INS keeps a record of the date the NTA is served.

II. SERVICE OF NTAs ON SEPTEMBER 11 DETAINEES

Table 1 describes when NTAs were served on the September 11 detainees. According to INS data, 59 percent of these detainees (452 of 762) were served NTAs within 72 hours of their arrest, in accordance with INS practice. In the remaining 192 cases for which data was available, the INS took more than 72 hours to serve NTAs.[32] Of these 192 detainees, 71 percent (137) were arrested by the INS in the New York City area. On average, September 11 detainees arrested in New York City and housed at the MDC received their NTAs 15 days from the time of their arrest.

[31] 8 U.S.C. § 1229(a)(1). The INS is not required to serve NTAs on certain categories of aliens. For example, the INS is not required to serve NTAs on aliens under criminal indictment and not yet in INS custody until their criminal cases are resolved and the aliens have served their sentences. In addition, reinstatement of an alien's prior final order of removal does not require the INS to serve a new NTA.

[32] Of the 762 detainees, 118 were excluded from this analysis for the following reasons: 90 were served with NTAs prior to September 11, 2001, because they already had a final order of removal on immigration violations before September 11, 2001; 21 were not required to be served with NTAs; and 8 had arrest dates prior to September 11, 2001.

Table 1 Number of Days Between Arrest Date and NTA Served Date for September 11 Detainees		
Number of Days	**Frequency**	**Percent of Total**
3 days or less	452	59.3%
4 – 10 days	71	9.3%
11 – 17 days	43	5.6%
18 – 24 days	30	3.9%
25 – 31 days	24	3.1%
More than 31 days	24	3.1%
Excluded from analysis	118	15.5%
Total	762	100%*

* Rounded

Table 2 summarizes the timing of charges filed against all 762 September 11 detainees and for sub-sets of detainees in the OIG sample groups from the MDC and Passaic.

Table 2 Timing of NTA Service			
Service of NTA	**All Sept. 11 detainees**	**MDC detainees**	**Passaic detainees**
Detainees charged in 3 days or less	452 (59.3 %)	24 (45.3%)	22 (33.3%)
Detainees charged in more than 3 days	192 (25.2%)	14 (26.4%)	18 (27.3%)
Detainees with excluded values	118 (15.5%)	15 (28.3%)	26 (39.4%)
Total	762 (100.0%)	53 (100.0%)	66 (100.0%)

III. REASONS FOR DELAY IN SERVING NTAs

A. Pending Criminal Charges

According to INS data, 12 of the 192 September 11 detainees served with NTAs more than 3 days after their arrests also were charged with a criminal offense. The INS is not required to serve an NTA on an alien charged with a

September 11 detainee arrested in New York City on October 1, 2001, pursuant to a PENTTBOM lead, was charged with passport fraud, marriage fraud, and alien smuggling. The detainee was transported to the MDC on October 3, 2001. On April 3, 2002, the INS served an NTA on the detainee for the immigration violation of overstaying a nonimmigrant visitor visa for business purposes. The following day, the detainee was sentenced in the Eastern District of New York to "time served" on the alien smuggling charge. The detainee was removed from the United States on May 30, 2002. Because the detainee was in custody based on a criminal indictment, the INS was not required to serve his NTA at the time of his initial arrest.

We identified 5 September 11 detainees who the INS served with NTAs an average of approximately 168 days after their arrest. In some of these cases, we found appropriate reasons for the delays – for example, two of the detainees were charged with both immigration and criminal offenses, but were held on the criminal offense and therefore were not in INS custody. Consequently, the INS did not serve NTAs on these two detainees until the BOP or the U.S. Marshals Service transferred custody of the detainees to the INS. However, according to INS data, once this transfer occurred, the INS still took 36 and 11 days, respectively, to serve NTAs on these detainees.

B. Delays Caused by Logistical Disruptions in New York City

The closure of the INS New York District Office at 26 Federal Plaza and the suspension of overnight delivery service to lower Manhattan after the September 11 attacks contributed to delays in NTA service. The detainees' A-Files were stored at the National Records Center in Lee's Summit, Missouri, and the INS New York District had to request copies of the detainees' A-Files from the Records Center so that INS agents in New York City could determine the appropriate charges.[32] With the disruptions in lower Manhattan, delivery of the A-Files was often delayed. Initially, in an attempt to speed up the review process, employees from the INS New York District and the National Records Center tried to select specific documents from a detainee's A-File to fax to the INS New York District. However, INS New York District Counsel said this process was not effective because attempting to describe legal documents over the telephone proved inadequate for the INS New York District to determine their significance to the detainee's case.

[32] A-Files for September 11 detainees arrested in the New York City area had to be sent first to the INS New York District rather than to INS Headquarters because the District in which the detainee was arrested had to prepare and serve the NTA. A-Files are essential to preparing an NTA because they contain the detainees' complete immigration histories.

C. Delays Caused by INS Headquarters Review of NTAs

We found that the INS policy requiring all charging documents for September 11 detainees to be reviewed and approved by INS Headquarters also may have contributed to the delay in serving NTAs on many detainees. On September 15, 2001, the INS issued an Operational Order (discussed in Chapter 4) that directed all INS field offices to transmit copies of September 11 detainee case documents, including NTAs, to the National Security Unit (NSU) at INS Headquarters. Another Operational Order issued the following day stated that no charging documents should be served until the "facts and circumstances of the case" were reviewed and approved for legal sufficiency both by the NSU and the INS's Office of General Counsel.[33] Prior to the September 11 attacks, INS attorneys in the District offices had reviewed and approved NTAs for legal sufficiency.

According to Pearson, the INS Executive Associate Commissioner for Field Operations, INS Commissioner James Ziglar decided that NTAs for all September 11 detainees had to be approved at INS Headquarters because of some "glaring errors" in detainee charging documents in several early detainee cases. Pearson said that three or four September 11 detainees were charged with incorrect violations of immigration law in the first week after the terrorist attacks. While he said that these errors were not "pervasive," the INS nonetheless was concerned that a potential terrorist could be released from INS custody because of erroneous charges on an NTA, and therefore wanted INS Headquarters officials to review all NTAs before they were served on the detainees.

Pearson's order required that the INS New York District fax a copy of the detainee's often-voluminous A-File to INS Headquarters. INS New York District Counsel told the OIG that the volume of documents being sent to INS Headquarters often caused facsimile machines at the INS New York District Office to break down. These facsimile transmission problems, coupled with the additional NTA review process at INS Headquarters, contributed to the delays in serving NTAs on the September 11 detainees.

On November 28, 2001, the INS rescinded the requirement that INS Headquarters review all NTAs for September 11 detainees and returned this responsibility to INS field offices. The chief of the INS's National Security Law

[33] The INS Office of General Counsel formed a group of attorneys known as the Legal Sufficiency Unit at INS Headquarters to review the legal sufficiency of NTAs prepared for September 11 detainees.

Division said that by November 28 the volume of September 11 detainee arrests had diminished and that centralized NTA review no longer was required.

D. Delays Caused by Transfers of September 11 Detainees

The INS was forced to close its Service Processing Center (SPC) on Varick Street in Manhattan after the terrorist attacks due to a loss of electricity and utilities. While detainees could no longer be housed in the Varick Street SPC, they could still be processed there. The INS's Eastern Region Office, which has jurisdiction over both the New York and Newark Districts, determined that the Newark District had available bed space in contract county jails to house immigration detainees formerly held at the Varick Street SPC. On September 11, 2001, New York District staff transported to the Newark District all 244 aliens who had been held at the Varick Street SPC. According to INS data, approximately 200 more detainees arrested in connection with September 11 leads in New York City were subsequently transferred to the INS Newark District from September 11, 2001, through May 31, 2002.

Facility determinations for September 11 detainees initially were made by the INS New York District, but beginning on September 23, 2001, these decisions required the approval of INS Headquarters.[33] After INS Headquarters took over facility determinations for September 11 detainees, all detainees arrested in New York City were transported to the Newark District unless INS Headquarters informed the New York Office that a specific detainee should be held at the MDC. The INS deferred to FBI officials regarding decisions about whether detainees should be designated "high interest" and therefore housed in high-security facilities such as the MDC.[34]

INS policy requires that NTAs and other legal documents be prepared by the arresting INS officer. Consequently, September 11 detainees arrested in the New York City area should have been processed for any immigration violations in the New York District, and Newark District officials should have received NTAs for all transferred detainees when the detainees arrived in the INS Newark District.[35] However, the New York Assistant District Director for

[33] Pearson said he decided to centralize reporting and transfer authority for detainees at INS Headquarters because INS District Offices did not have the "visibility" as to which detainees were of interest to the FBI. He said that he wanted to ensure that FBI agents in the field knew where detainees were being held in order to facilitate interviews.

[34] According to Pearson, "high interest" September 11 detainees had possible direct involvement with the September 11 terrorist attacks, needed to be interviewed by U.S. law enforcement, presented potential flight risks, and continued to present potential threats to the public. For a more extensive discussion of the detainee classification issue, see Chapter 4.

[35] On April 17, 2001, Scott Blackman, the INS Eastern Region Director, had issued standardized procedures for transfers of detainees between districts in the Eastern Region that (cont'd)

Investigations told the OIG that the requirement for INS Headquarters review of all NTAs delayed this process, and many detainees already had been transferred to the INS Newark District by the time the INS New York District received INS Headquarters's sign-off on an NTA.

Because the detainees' A-Files did not accompany the detainees when they were transferred to the INS Newark District, the INS Newark District was unaware that the NTAs had not been served and was unable to take timely actions to ensure that the NTAs were served within the INS's 72-hour target.

The INS detention standards also require that the NTA and the alien's A-File or a substitute "temporary file" accompany a detainee being transferred to another INS detention facility, including facilities like Passaic under contract with the INS to house federal immigration detainees. We found that the INS New York District's failure to transfer all of the necessary paperwork for September 11 detainees arrested in New York but transferred to Newark resulted in inconsistent and untimely service of NTAs on the detainees.

Because the INS New York District transferred September 11 detainees to the INS Newark District before receiving INS Headquarters's approval of charging documents, NTAs for many of the September 11 detainees had not been served by the time of the transfer. Yet, both the INS New York and the Newark Districts assumed that the NTAs had been served. INS Newark District officials who processed the transferred detainees' cases told us that they assumed that NTAs had been served. The INS New York Assistant District Director for Investigations similarly said the New York District assumed that INS Headquarters had provided the INS Newark District with a copy of the approved NTAs when, in fact, it had not.

In October 2001, INS Eastern Region officials became aware of the case-processing problems associated with detainees transferred from the INS New York District to the INS Newark District. Beginning October 5, 2001, the INS Eastern Region detailed INS detention officers and investigators from other INS districts to help address the increased workload of the Newark District. This eventually alleviated some of the processing delays, although INS Newark District officials said it took time to work through the backlog of cases while new cases arrived at the INS Newark District.

specified responsibilities for "sending" Districts and "receiving" Districts. These procedures stated that all charging documents, including NTAs, will be "issued and signed" and served on detainees "prior to transfer."

IV. OIG ANALYSIS

The INS does not keep a record of when the charging determination is made for aliens charged with immigration violations. This makes it impossible to determine how often the decision is made within the 48-hour time period required by federal regulations. For the same reason, it is impossible to determine how often the INS took advantage of the "reasonable time" exception to the 48-hour requirement, an exception that is based on "extraordinary circumstances."

We found that the INS did not consistently serve September 11 detainees with NTAs within its stated goal of 72 hours – only 60 percent were served within 72 hours. Until the INS removed its requirement for INS Headquarters review, the average length of time to serve the NTA was over seven days. Many detainees did not receive notice of the charges for weeks, and some for more than a month after being arrested.

One significant reason for the delay was the INS Headquarters's requirement that it review and approve all NTAs for legal sufficiency. This delayed the serving of NTAs on September 11 detainees. This was especially true for those detainees arrested in New York City but transferred to the INS Newark District. While INS Headquarters wanted to ensure the accuracy and completeness of NTAs for September 11 detainees, this temporary review mechanism delayed the process. It also produced a disconnect between the INS New York and Newark Districts because the INS New York District thought the charging documents it submitted to INS Headquarters for approval had been forwarded to the INS Newark District when it took custody of the detainees. Conversely, the INS Newark District presumed that approved NTAs already had been served on the September 11 detainees arrested in New York City in accordance with INS procedures.

We believe the INS New York District should have exercised more diligence in ensuring that the INS Newark District was aware of which detainees had not been served with NTAs prior to their transfer. The practice of transferring detainees from the INS New York District to the Newark District after the detainees' arrests in New York City, along with the failure of the New York District to transmit required immigration documents with the transferred detainees, caused significant delays in serving NTAs on September 11 detainees housed in New Jersey detention facilities.

In addition, the increased workload experienced by the INS Newark District's Office of Detention and Removal after the terrorist attacks further compounded the delays in serving NTAs on September 11 detainees.

These delays affected the September 11 detainees in various ways. First, it postponed detainees' knowledge of the specific immigration charges they

faced. Second, it affected the detainees' ability to obtain effective legal counsel given the lack of specific charges. Third, a delay in serving NTAs and accompanying documents postponed the detainees' opportunity to request bond re-determination hearings and seek release. These effects on detainees were important, given the Department's "no bond" policy for September 11 detainees and the conditions under which detainees were held, both of which we describe in more detail later in this report. We believe the INS should have made a more systematic effort to ensure that NTAs were served on September 11 detainees in a timely fashion.

CHAPTER FOUR

THE CLEARANCE PROCESS

This chapter examines the Department's process for clearing the September 11 aliens who were detained because of possible links to terrorism. Specifically, we examine how problems with the process significantly lengthened the time detainees spent in custody. First, we discuss the origins of the Department's directive that all September 11 detainees be held until the FBI cleared them of any connection to terrorism. Next, we examine the series of Operational Orders issued by INS Headquarters to its field offices in the weeks immediately following the September 11 attacks that sought to address the growing number of detainees arrested in connection with the PENTTBOM investigation.

We then turn to the process developed by the Department to clear the detainees of any connection to terrorism. In particular, we examine the activities of the squad created by the FBI New York Field Office that conducted most of the clearance investigations of September 11 detainees. We then describe the problems caused when the INS New York District failed to inform Headquarters of the arrest of hundreds of aliens "of interest," and the discovery of a separate list of September 11 detainees kept by the FBI New York Field Office in the weeks immediately following the terrorist attacks, a list apparently unknown to FBI and INS officials in Washington, D.C. who were attempting to coordinate all September 11 detainee cases. We also discuss the effects of detainee name checks in databases maintained by the Central Intelligence Agency (CIA). We end by examining the FBI's development of a "watch list" of potential terrorist suspects and its process for adding and removing names from that list.

I. "HOLD UNTIL CLEARED" POLICY

A. Origins of Policy

Officials from the FBI and the INS told the OIG they clearly understood from the earliest days after the terrorist attacks that the Department wanted September 11 detainees held without bond until the FBI cleared them of any connections to terrorism. This "hold until cleared" policy was not memorialized in writing, and our review could not determine the exact origins of the policy. However, this policy was clearly communicated to INS and FBI officials in the field, who understood and applied the policy.

We found that the directive was communicated to the INS and the FBI by a number of Department officials, including Stuart Levey, the Associate Deputy Attorney General responsible for oversight of immigration issues. Michael

Pearson, the INS Executive Associate Commissioner for Field Operations, said that Levey called a senior INS official the week after the September 11 attacks and directed that no INS detainees should be released without being cleared by the FBI. Pearson said he also received instructions from INS Commissioner James Ziglar that none of the detainees should be released by the INS until they had been cleared by the FBI of any connections to terrorism. Pearson told the OIG that he passed these instructions along to employees at INS Headquarters's units assigned to handle September 11 detainee cases.

Similarly in the FBI, our interviews and review of documents confirm that FBI officials understood and applied the "hold until cleared" policy. For example, an October 26, 2001, electronic communication (EC) (similar to an e-mail) from an FBI agent in the SIOC to FBI field offices stated that, "Pursuant to a directive from the Department of Justice, the INS will only remove individuals from [the special interest] list after the INS has received a letter from FBIHQ [FBI Headquarters] stating that the FBI has no investigative interest in the detainee."

In addition, an attorney with the FBI's Office of General Counsel who worked on the SIOC Working Group told the OIG that it was understood that the INS was holding September 11 detainees because the Deputy Attorney General's Office and the Criminal Division wanted them held. She said the Deputy Attorney General's Office took a "very aggressive stand" on this matter, and the Department's policy was clear even though it was not written.

Levey told the OIG that the idea of detaining September 11 detainees until cleared by the FBI was "not up for debate." He said he was not sure where the policy originated, but thought the policy came from "at least" the Attorney General.

A Senior Counsel in the Deputy Attorney General's Office who worked closely with Levey on immigration matters ("Senior Counsel to the DAG") stated in her response to the draft of this report that those involved in the discussion of the process, including attorneys from the INS, OIL, and the Criminal Division (including TVCS), were aware that the strategy had risks, and clearly anticipated the filing of habeas corpus petitions because of the position the Department planned to take that any illegal alien encountered pursuant to a PENTTBOM lead should be detained until cleared by the FBI. She noted that this was "unchartered territory." On September 27, 2001, the Senior Counsel sent an e-mail to David Ayers, Chief of Staff to the Attorney General, on September 27, 2001, that discussed this "hold until cleared" policy. The e-mail described the "strategy for maintaining individuals in custody." The document attached to the e-mail, entitled "Maintaining Custody of Terrorism Suspects," begins with a "Potential AG Explanation" that states:

> The Department of Justice (Department) is utilizing several tools to ensure that we maintain in custody all individuals suspected of being involved in the September 11 attacks without violating the rights of any person. If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant. Many people believed to be involved in the attacks, however, are not present legally and they may be detained, at least temporarily, on immigration charges. As of September 27, 2001, the Immigration and Naturalization Service (INS) was detaining without bond 125 aliens related to this investigation on immigration charges.

The document then describes plans for handling bond hearings and coordination efforts among the FBI, INS, and Criminal Division to ensure that September 11 detainees would remain in custody. Levey told us this document was drafted to enable the Attorney General to provide an explanation as to how, within the bounds of the law, the Department could hold and not release aliens who were suspected of terrorism.

Other senior Department officials confirmed that the directive to hold the September 11 detainees without bond stemmed from discussions at the highest levels of the Department. Assistant Attorney General Michael Chertoff told the OIG that in the early days after the terrorist attacks the issue was discussed among the Attorney General, Deputy Attorney General, and FBI Director that detention should be sought of a charged person "if there is a link to the hijackers and we are not able to assure that the person is not a threat and there is a legal violation." Alice Fisher, a Deputy Assistant Attorney General in the Criminal Division and a participant in the SIOC Working Group, told the OIG that Chertoff told her that "we have to hold these people until we find out what is going on" and that, in some cases, they could use immigration charges to keep the detainees in custody.

David Laufman, Chief of Staff to the Deputy Attorney General, told the OIG that he recalled a meeting which INS representatives attended soon after the terrorist attacks that included a discussion of whether potential immigration violations could be "leveraged" against September 11 detainees when there was insufficient information for criminal cases. He added that it was recognized that, "if we turn one person loose we shouldn't have, there could be catastrophic consequences." He said he recalls, however, asking Levey to take whatever steps were appropriate to expedite clearance by the FBI and the CIA.

Daniel Levin, Counselor to the Attorney General, told the OIG that he could not say for certain when the clearance policy was developed or at what level. He described a "continuous meeting" for the first few months after the terrorist attacks involving the Attorney General, Deputy Attorney General, FBI

Director, and Chertoff, and said he was sure that the issue of holding aliens until they were cleared was discussed.

The Deputy Attorney General told the OIG that he remembers the "decision to hold without bond" being discussed, and that he was in favor of requiring the clearance process "within the bounds of the law." He explained that the threat after September 11 was a different threat that required a different approach. He said that investigating and prosecuting could not be the focus, as it had been before the terrorist attacks, and the Department needed to aggressively protect public safety, within the bounds of the law, by disrupting and preventing further incidents.

FBI Director Mueller stated that he did not recall being involved in any discussions about the creation of the "hold until cleared" policy, although he learned about the policy later.

When asked about a "hold until cleared" policy, the Attorney General told the OIG that the Department would want to know whom the detainees were if it was getting ready to remove them. He noted the inherent difficulty involved in conducting a "clearance" process, in that clearing someone is akin to "proving a negative." He also noted that the Department does not assert that it could hold anyone "forever" without regard to a predicate offense. However, the Attorney General said he had no reluctance to do those things legally permissible to detain someone who had violated the law.

B. Implementation of Policy

From the first days after the terrorist attacks, the INS adopted the term "of interest" to identify aliens arrested on immigration violations in connection with the September 11 investigation who needed to be cleared by the FBI of any connections to terrorism before they could be released or removed from the United States. Detainees who were not "of interest" to the FBI's terrorism investigation did not have to be cleared by the FBI and could be processed according to normal INS procedures. The FBI was responsible for determining whether an alien arrested in connection with a PENTTBOM lead on immigration charges should be further investigated. If it found further investigation warranted, then the alien was "of interest" and the FBI notified the INS of that determination. However, there were many cases where the FBI told the INS that it could not determine at the outset whether it had an interest in the alien. In cases of affirmative FBI interest or a statement that interest could not be determined, the INS treated the alien as "of interest."

Problems quickly arose upon implementation of the "hold until cleared" policy for aliens arrested on PENTTBOM leads, because the Department and the FBI did not develop clear criteria for determining who was, in fact, "of interest" to the FBI's terrorism investigation. From our interviews, we

determined that, for the most part, aliens were deemed "of interest" based on the type of lead the law enforcement officers were pursuing when they encountered the aliens, rather than any evidence that they were terrorists. In the New York City area, for example, anyone picked up on a PENTTBOM lead was deemed "of interest" for purposes of the "hold until cleared" policy, regardless of the strength of the evidence or the origin of the lead. A PENTTBOM lead was considered any lead that was in any way connected to the World Trade Center or Pentagon investigation, or a lead that raised the specter of "suspicious activity" by an alien who might possibly be a terrorist. However, there need not be any evidence of connection to the terrorists or to the World Trade Center or Pentagon bombings for a lead to be considered a PENTTBOM lead. Any illegal alien encountered by New York City law enforcement officers following up a PENTTBOM lead – whether or not the alien turned out to have a connection to the September 11 attacks or any other terrorist activity – was deemed to be a September 11 detainee.

In a January 2002 court proceeding, the Department defined the term "September 11 detainees" as "individuals who were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them."[36]

Many of the persons arrested as part of the PENTTBOM investigation were aliens unlawfully present in the United States either because they entered this country illegally or because they entered legally but remained after their authorization to do so had expired. It is unlikely that most if not all of the individuals arrested would have been pursued by law enforcement authorities for these immigration violations but for the PENTTBOM investigation.[37] Some appear to have been arrested more by virtue of chance encounters or tenuous

[36] This definition was contained in the declaration of James Reynolds, Chief of the Terrorism and Violent Crime Section in the Department's Criminal Division (the "Reynolds Declaration"), submitted by the Department on January 11, 2002, in support of the Department's summary judgment motion in connection with the case entitled Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 01-civ-2500 (D.D.C. filed Dec. 6, 2001).

[37] The September 11 attacks focused renewed attention on the importance of knowing when nonimmigrant visitors enter and depart the United States. The OIG has reported previously on the INS's efforts to identify and remove nonimmigrant overstays, most recently in an April 2002 follow-up report that found the INS has made little progress to effectively address the issue. The follow-up review concluded that the INS still did not have a reliable system to track overstays, did not have a specific overstay enforcement program, and could not provide accurate data on overstays. See Follow-Up Report on INS Efforts to Improve the Control of Non-Immigrant Overstays, Report No. I-2002-006, April 2002, *available at* http://www.usdoj.gov/oig/inspection/I-2002-006/report.pdf.

connections to a PENTTBOM lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity.

For example, on September 15, 2001, New York City police stopped a group of three Middle Eastern men in Manhattan on a traffic violation. The men had the plans to a public school in their car. The next day, their employer confirmed that the men were working on construction at the school and that it was appropriate for them to have the plans. Nonetheless, they were arrested and remained detained as September 11 detainees. Another alien was arrested on September 22, 2001, because the phone company mistakenly put his phone calls home to [redacted] on the bill of a New York [redacted] office and the [redacted] office called to report the "suspicious" bill. The alien was arrested, detained on immigration charges, and considered a September 11 detainee. He was not cleared until January 9, 2002. Another Middle Eastern alien was arrested because he went to a car dealership on September [redacted], 2001, and was anxious to purchase a car right away. He put down a [redacted] deposit on a car but did not return on September [redacted], 2001, for the car as he agreed he would. He was arrested on September 29, 2001 and was not cleared until April 29, 2002. Another alien was arrested because a person called the FBI a few days after the terrorist attacks to say that six to ten weeks prior, the [redacted] she hired through [redacted], who was an [redacted] male, told her that he was a licensed pilot and was saving to go to flight school in the U.S. to learn to fly commercial jets. He was arrested on September 24, 2001, and not cleared until February 12, 2002.[38]

In the days immediately following the September 11 attacks, before the clearance process was centralized in Washington, D.C., the INS could obtain an indication of "no interest" from an FBI field office and proceed to process the alien as a "regular" immigration case. In mid-September 2001, however, the Department instructed the INS that before it could treat a September 11 detainee as a "normal" immigration case, the INS needed to obtain a clearance letter from Michael Rolince, Chief of the FBI's International Terrorism Operations Section (ITOS) in its Counterterrorism Division.[39] According to several witnesses with whom we spoke, the FBI and the Department believed that the PENTTBOM investigation should be viewed as a "mosaic" that contained countless individual pieces of information and evidence, and field offices would not be in a position to determine if any single item was of significance to this mosaic. Therefore, it was believed that FBI Headquarters would have a broader perspective on the PENTTBOM investigation and would be in a better position to make an assessment of whether an individual alien

[38] Other examples of tenuous PENTTBOM leads that led to detainee arrests and their designation as "of interest" to the September 11 investigation were described in Chapter 2.

[39] A copy of a "Rolince" clearance letter is attached at Appendix E.

detained in connection with a PENTTBOM lead was "of interest" to the investigation. However, as we describe below, this centralized clearance process was slow and insufficiently staffed, resulting in many detainees being held for long periods of time while no clearance investigations were being conducted.

II. INS OPERATIONAL ORDERS

By September 17, 2001, INS agents working with the FBI on PENTTBOM leads had detained approximately 69 aliens, and 40 bond hearings were scheduled for the following week. Michael Rozos, Chief of the INS's Long Term Review Branch, told the OIG that, at the time, staff at INS Headquarters began to believe that the PENTTBOM investigation could involve the largest number of INS detainees since the Mariel boatlift in 1980.[40]

In response to the increasing number of aliens being detained as a result of the PENTTBOM investigation, officials at INS Headquarters developed a series of procedures to ensure that the detainees' cases were handled uniformly. INS Headquarters officials told the OIG they also wanted to ensure that they had complete information on each September 11 detainee, because senior Department officials were requesting regular updates on the status of the cases. Consequently, Pearson, the INS Executive Associate Commissioner for Field Operations, disseminated 11 Operational Orders to INS field offices regarding the handling of September 11 detainees during a 12-day period beginning on September 15, 2001.

These Operational Orders varied the normal procedures for handling INS detainees. Routine immigration cases are usually handled by INS district offices and normally do not come to the attention of INS Headquarters officials. However, even before September 11 the National Security Unit (NSU) in INS Headquarters handled immigration cases involving terrorism and war crimes. Prior to September 11, the NSU consisted of three INS agents stationed at INS Headquarters and three agents working at the FBI's ITOS at FBI Headquarters. Among other duties, the NSU coordinated the INS's participation in the New York JTTF.

The Operational Orders created a different track for aliens detained in connection with the PENTTBOM investigation. After the September 11 attacks, Pearson designated the NSU as the INS's intake unit for all immigration detainees designated as "special interest" cases. In the weeks after the attacks,

[40] In 1980, a flotilla of boats carrying more than 100,000 undocumented Cubans arrived in the United States after Cuban authorities permitted a mass exodus from the Cuban port of Mariel. The influx of aliens put a tremendous strain on federal immigration and detention facilities in south Florida and elsewhere across the country.

the NSU received information, primarily by facsimile, from INS field offices across the country that had detained aliens in connection with the PENTTBOM investigation. Daniel Cadman, the head of the NSU, told the OIG that the NSU consulted with the FBI to determine whether detainees were "of interest." If the FBI notified the INS that the detainee was "of interest," or if the FBI could not state whether or not it had interest, the INS labeled the detainee as a "special interest" case and forwarded the appropriate documentation to its Custody Review Unit (CRU). This unit, created after September 11, 2001, was the unit at INS Headquarters responsible for managing the September 11 detainees' immigration cases.

Pearson's Operational Orders described these INS procedures. His first order required that "information relating to investigating events or actions taken in [September 11] cases should be relayed immediately – repeat, immediately – to Headquarters NSU, with concurrent notification to the appropriate regional office." Pearson told the OIG that he did not want INS field offices handling any September 11 cases without INS Headquarters's full involvement and approval. A second order, sent later that same day, set forth the specific documents field offices were required to send to the NSU for each case.

Pearson's third order, issued September 16, 2001, directed INS field offices to obtain approval from INS Headquarters before issuing any charging documents for September 11 detainees. In addition, the order instructed INS agents working with the FBI on the terrorism investigation to "exercise sound judgment" in deciding whether to arrest illegal aliens they encountered and generally to do so only if the FBI had "an interest" in the aliens.

A seventh operational order from Pearson on September 18, 2001, stated that the FBI had issued an EC to FBI field offices that included the following language:

> As of early this morning, INS has sixty-one suspect foreign nationals in their custody for administrative violations of the Immigration and Nationality Act. In order to ensure continued custody of these individuals until an informed decision has been made regarding their potential as criminal suspects/material witnesses, it is essential that all field offices immediately make contact with their respective INS counterparts and articulate IN WRITING why these detained individuals are of significance. In turn, those submissions will be used by INS to argue for continued custody in imminent bail recommendation hearings as well as by the Criminal Division for possible preparation of material witness warrants.

Pearson's order instructed INS field offices that participated in these arrests to communicate to their local FBI field office the urgency of

receiving written assessments of the detainees' investigative significance because bond re-determination hearings were forthcoming for many of the detainees.[41]

A variety of INS, FBI, and Department officials who worked on these September 11 detainee cases told the OIG that it soon became evident that many of the people arrested during the PENTTBOM investigation might not have a nexus to terrorism. To address this concern, Pearson issued an order on September 22, 2001, the tenth in the series, which addressed the responsibilities of INS agents who were participating in joint operations with the FBI when they encountered illegal aliens. The order instructed INS field agents to "exercise sound judgment" in determining whether circumstances require immediate arrest and detention, and urged INS agents to limit arrests to those aliens in whom the FBI has an "interest" given the "Servicewide resource implications" of the September 11 attacks. The order reiterated that field offices were required to "immediately notify" the NSU and INS District Counsel of any arrests and to provide information regarding the "degree of interest expressed by the FBI field office, if known."

The order stated that "[n]o charging documents will be issued in any such case until the facts and circumstances of the case have been reviewed and the documents approved jointly by Headquarters National Security Unit and Headquarters Counsel (National Security Law Division, 'NSLD')." In instances where the person was already under arrest or where the detainee's connection to terrorism is unknown, the order said, "we encourage and expect forwarding of cases for review and consideration – this is one reason we require the field to advise us of expressions of interest by the FBI." Conversely, the order discouraged INS field offices from submitting cases that are "clearly of no interest in furthering the investigation of the terrorist attacks of September 11th."

In addition to issuing a series of Operational Orders, INS Headquarters developed standard operating procedures for processing September 11 detainees. The procedures were intended to keep INS Headquarters informed of INS field activities related to the terrorism investigation, to enable the INS to maintain an accurate list of all INS detainees in whom the FBI had an interest, and to ensure that the INS did not inadvertently release a detainee in violation of the Department's instructions to hold all September 11 detainees until

[41] INS District Directors set the initial bond for aliens charged with immigration offenses. Because of the Department's blanket "no bond" policy for September 11 detainees, District Directors refused bond for these detainees. A detainee not satisfied with the District Director's initial bond determination could request a bond re-determination hearing before an Immigration Judge. We discuss in more detail bond issues and bond hearings in Chapter 5.

cleared by the FBI. Under normal circumstances, INS Headquarters officials would not have reviewed charging documents in "routine" immigration cases.

III. THE CLEARANCE PROCESS

Department officials told the OIG that they initially believed the FBI would be able to clear, relatively quickly, aliens arrested in connection with a September 11 lead and who were "of interest" to the FBI's PENTTBOM investigation. Many said they thought the clearance process generally would take only a few days for the majority of the aliens arrested on PENTTBOM leads. At most, they expected the process would take a few weeks to clear aliens arrested on PENTTBOM leads but who had no additional indications of a connection to terrorism.

For example, Michael Chertoff, the Assistant Attorney General in charge of the Criminal Division, told the OIG that he believed many clearances could be done "within a few days." In his estimation, the clearance process involved a check of Government databases – including those at the CIA – and an evaluation by the FBI of all investigative information that had come to light. As late as the summer of 2002, other Department officials told the OIG that they were under the impression FBI clearances were completed in only a few days. The Attorney General stated that he did not recall hearing any complaints about the timeliness of the clearance process or a lack of resources dedicated to the effort to clear detainees.

The belief that the clearance process would occur quickly was inaccurate. As we describe below, the FBI cleared only 2.6 percent of the 762 September 11 detainees within three weeks of their arrests. The average length of time from arrest of a September 11 detainee to clearance by FBI Headquarters was 80 days.

A. Determining Which Aliens Would be Subject to the Clearance Process

As described above, the INS tried to hold without bond any alien arrested on immigration charges in whom the FBI expressed an interest, or any alien in whom the FBI's interest was undetermined. If the FBI could not state whether it had an interest in a particular detainee (i.e., the level of interest was "undetermined" or "unknown"), then the INS treated the case as if it was "of interest" to the FBI. For example, Daniel Cadman, the head of the INS's NSU, said that INS Executive Associate Commissioner Pearson instructed him that, absent a clear written statement to the contrary from Rolince, the ITOS Chief in the FBI's Counterterrorism Division, any aliens arrested in connection with the PENTTBOM investigation should be considered "of interest."

Kenneth Ellwood, the INS Philadelphia District Director who was brought to INS Headquarters to assist in the detainee operation, told the OIG that the FBI created difficulties by not giving the INS clear signals about who should be on the "special interest" list. Ellwood said the FBI did not have enough agents to run down all the leads on many of the aliens to the point where they could feel comfortable about making an initial determination as to who was "of interest." The FBI attorney assigned to the SIOC Working Group said that the FBI did its best with regard to "interest" classification determinations, but she acknowledged that the pace of information from FBI field offices about detainee cases was slow. Others told us they believed the FBI did not provide sufficient support to the clearance process. Nonetheless, given that the FBI was leading the PENTTBOM probe, the INS deferred to FBI assessments about who was "of interest" to its investigation.

We also found that the classification issue was not handled uniformly nationwide. In the New York City area, the INS forwarded case files for all aliens it arrested to the FBI New York Field Office for clearance. We found that neither the FBI nor the INS in New York attempted to distinguish between aliens encountered coincidentally to a PENTTBOM lead and those who were the subject of a PENTTBOM lead. In contrast, INS offices in jurisdictions outside of the New York City area used the procedures in Pearson's Operational Orders described earlier in this chapter to try to screen out cases in which illegal aliens showed no evidence of any connection to terrorism. Officials at INS Headquarters told the OIG that this "vetting process" was somewhat helpful in ensuring that only meritorious cases were classified as September 11 detainees and, consequently, held without bond and required to undergo clearance by the FBI. However, this "vetting process" was not applied in New York City.

Several Department officials involved in the terrorism investigation also told the OIG that it soon became clear that many of the September 11 detainees had no immediately apparent nexus to terrorism. As a result, the terrorism investigation soon narrowed its focus to a few of the individuals who were detained, not the vast bulk of the aliens arrested in connection with PENTTBOM leads. For example, David Kelley, the Deputy U.S. Attorney for the Southern District of New York who immediately after the September 11 attacks came to Washington, D.C., to help supervise the investigation of the attacks, told the OIG that within one to three days of the attacks prosecutors were focusing on individuals of "genuine investigative interest," such as a person whose telephone number was linked to one of the hijackers or a person who lived in a building near a location of high interest to the terrorism investigation, as opposed to aliens identified by the FBI simply as "of interest." Other Department officials acknowledged to the OIG that they realized that many in the group of September 11 detainees were not connected to the attacks or terrorism in general.

Nevertheless, the Department required the FBI to clear all September 11 detainees before they could be released – a policy supported uniformly by FBI staff interviewed by the OIG. Many witnesses told the OIG that no one wanted to prematurely release a September 11 detainee only to find out later that the person was a terrorist who posed a threat to the United States. Yet, as we next describe, the FBI clearance process for September 11 detainees was slow and not given sufficient priority, which resulted in most detainees being held for months before they were cleared.

B. FBI Field Office Role in the Clearance Investigation

The responsibility for clearing an individual September 11 detainee of a connection to terrorism fell, at least initially, to the FBI field office in whose jurisdiction the alien was arrested.[42] The FBI New York Field Office bore the brunt of this requirement because almost 60 percent of the 762 September 11 detainees were arrested in the New York City area. The FBI in New York City created a special squad called "I-44A" to assist FBI agents and the JTTF in following up on some of the more than 20,000 PENTTBOM leads covered by the FBI New York Field Office in the year following the terrorist attacks. This unit also was given the responsibility for clearing aliens arrested in connection with PENTTBOM.

Members of the I-44A squad told the OIG that after an alien's arrest in connection with a PENTTBOM lead, the INS agent forwarded a copy of the detainee's A-File to the I-44A squad for its use during the detainee's clearance investigation. After receiving the A-File, paralegals working in the I-44A squad began a series of computer checks to examine the detainee's background. These included checks of Department of Motor Vehicle records, the FBI's National Criminal Information Center database, Drug Enforcement Administration's databases, databases with information on authorized federal wiretaps, Federal Aviation Administration databases, State Department databases, INTERPOL databases, and searches of as many as nine other databases. While we were told that the FBI paralegals generally processed these database checks, if any "positive" information came back on an alien it was an FBI agent's responsibility to review that information and determine whether additional investigation was necessary.

Supervisors in the I-44A squad said they tried to assign each detainee's clearance investigation to the FBI agent who was present at the detainee's arrest. In some instances, however, this was not possible because the alien

[42] As discussed later in this chapter, FBI officials centralized the detainee clearance process at FBI Headquarters in October 2001. After this time, agents in FBI field offices continued to conduct clearance investigations of September 11 detainees, but FBI Headquarters officials coordinated CIA checks and eventually issued the formal clearance letters.

was arrested by other JTTF members or local law enforcement. In these cases, the clearance investigation was assigned to an FBI agent in the I-44A squad. FBI agents assigned detainee investigations were given a detailed set of instructions outlining the steps necessary to clear a detainee. In addition to conducting computer database and fingerprint checks, the agents were instructed to obtain from the detainee items such as identification documents and cell phone, and to run checks on all names, addresses, and telephone numbers obtained from those items. The clearance instructions also suggested interviewing landlords or employers "if necessary."

FBI agents conducting clearance investigations also were required to interview detainees unless the agents determined that initial interviews with the detainees at the time of their arrests adequately addressed the required topics. However, the list of 31 issues FBI agents were required to cover during their review was so comprehensive that in all 28 New York cases the OIG reviewed, FBI agents had to re-interview detainees during the clearance investigations. None relied solely on the detainees' arrest interviews for the clearance investigation. Moreover, the instructions directed FBI agents to interview detainees after I-44A paralegals had completed computer checks and clearance investigations. Given the required interview topics, the FBI agents' questions often elicited names, telephone numbers, and addresses that required additional investigation.

The OIG's review of 28 I-44A squad clearance files revealed that for many detainees the field work was rather straightforward – a few interviews in addition to the computer checks. In other cases, however, the clearance process required a substantial amount of investigative work for FBI agents.

The computer checks and detainee interviews were considered only the first level of clearance investigation. According to the instructions, if a detainee was "determined to be involved or associated with hijackers or terrorist organization" based upon the FBI agent's initial work, the agent was required to refer the matter to another FBI unit for additional investigation. In cases not referred for additional investigation, the agents drafted a summary document describing the clearance investigation and including their recommendation as to whether the detainee exhibited any connections to the September 11 attacks or terrorism in general. FBI agents sent the reports to Kenneth Maxwell, the Assistant Special Agent in Charge of the FBI New York Field Office, who, among his many other duties in the weeks immediately after the terrorist attacks, made the ultimate determination for the FBI New York Field Office regarding clearance of September 11 detainees.

FBI agents assigned to the I-44A squad told the OIG that obtaining final approval from Maxwell on a clearance investigation often took a significant amount of time because of his hectic schedule. Agents said they would gather ten or more cases before approaching Maxwell to conduct reviews and, in most

instances, they said Maxwell would sign clearance letters for all of the detainees. However, FBI agents said sometimes Maxwell would return a case to them for further investigation or would refer the case to the JTTF.

Until October 24, 2001, the FBI New York Field Office believed that no additional checks, other than its clearance process, were required to clear a detainee. On October 24, however, officials at FBI Headquarters notified its field offices that FBI Headquarters, rather than individual field offices, would be responsible for coordinating CIA "name checks" on all detainees (discussed in more detail below). The remainder of the tasks associated with the clearance investigation, including interviews of the detainee and any other witnesses as well as checks of law enforcement databases, remained the responsibility of FBI field offices.

C. CIA Name Checks

As part of the clearance process, the Department decided to ask that the CIA also conduct name checks on all September 11 detainees. The FBI centralized the CIA checks at FBI Headquarters because of concerns that requests from individual FBI field offices would flood the CIA and complicate its ability to respond. Prior to the September 11 attacks, FBI field offices across the country used a computer system to check if the CIA had information on a particular person. If that search was positive, or if the field offices wanted a more in-depth search, they contacted the CIA directly for information on a particular person. Similarly, the INS's NSU would send its inquiries directly to the CIA's Office of General Counsel (OGC), the point of contact for these informational requests.

An attorney in the CIA OGC explained to the OIG that prior to September 11, after receiving an inquiry from the FBI or INS, CIA OGC staff would send queries to the various CIA branches that might have pertinent information. CIA OGC staff would gather all relevant files and notify the FBI or INS that the information was available for review. AN FBI analyst or INS attorney would then review the CIA information. While this process was labor intensive and time consuming both for the CIA and the agency seeking the information, the CIA OGC attorney said that it had worked well in the past because the number of requests before September 11 was relatively small.

After the September 11 attacks, this system no longer worked because of the large volume of requests from the FBI. For example, a November 6, 2001, letter from the CIA OGC to an FBI special agent assigned to the SIOC Working Group explained that files of 42 individuals had been collected and were awaiting review. The letter also noted that the OGC has limited space in its offices for file storage and requested that the files be reviewed promptly.

In late October 2001, because of concerns that the checks which could be done from FBI offices were not adequate and because of the volume of requests for name checks sent directly to the CIA, FBI Headquarters centralized the process and required that all contact with the CIA concerning September 11 detainees be routed through FBI Headquarters. The FBI New York Field Office received an EC dated October 24, 2001, from an FBI agent assigned to the SIOC Working Group that stated:

> Effective with this communication, all CIA name checks will be conducted by FBIHQ. Therefore, once FBI New York has determined that there is no investigative interest in a detainee, FBI New York should send an EC to [the FBI] requesting that CIA name checks be conducted. Once [the FBI] has received the results of the CIA name checks, and a determination is made that there is no information of lead value, [FBI Headquarters] will advise FBI New York of this fact so that FBI New York can provide INS New York with a no investigative interest letter. FBI New York should not provide no interest letters to INS New York without CIA name checks being conducted.

Consequently, as of October 24, 2001, FBI Headquarters took over responsibility for the CIA name check portion of the detainee clearance process. After that date, the FBI New York Field Office did not issue clearance letters until it heard from FBI Headquarters that the CIA name check had not discovered any negative information associated with a September 11 detainee.

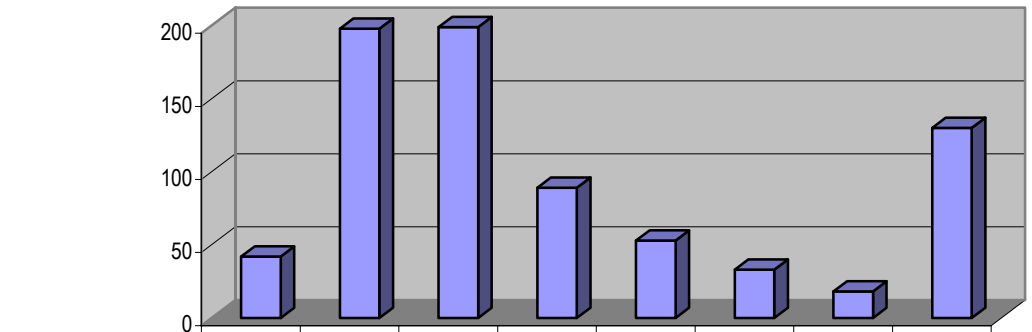
IV. TIMING OF CLEARANCES

We found the FBI took a long period of time to clear September 11 detainees. In an effort to examine the timeliness of the clearance process, the OIG analyzed information detailing the date detainees were arrested and the date FBI Headquarters issued final clearance letters.

The FBI cleared less than 3 percent of the 762 September 11 detainees within three weeks of their arrest. The average length of time from arrest of a September 11 detainee to clearance by FBI Headquarters was 80 days, and the median was 69 days. Further, we found that more than a quarter of the 762 detainees' clearance investigations took longer than 3 months. See Table 3 and Figure 7.

Table 3	
Number of days from arrest to FBI HQ clearance:	
Average	80.1
Median	69
Minimum	8
Maximum	244
Missing values*	130

Figure 7
Number of Days from Arrest to FBI HQ Clearance



*Arrest date or FBI Headquarters clearance date missing

V. DELAYS IN THE CLEARANCE PROCESS

A variety of factors contributed to the discrepancy between the time frames envisioned by Department officials overseeing the detainee clearance process and the actual time it took to clear detainees. Some of the delay was attributable to a Department decision to include all New York City area arrests in the pool of detainees who needed FBI clearances. Another reason for the delay was a shortage of agents at FBI field offices available to conduct detainee clearance investigations, given the many demands on the FBI in the fall of 2001 and early 2002. We concluded that the delay was not significantly affected by CIA response time on name checks, as some officials claimed to the OIG. Rather, a larger part of the delay was because of the length of time it took for FBI Headquarters officials to review CIA responses to the name checks.

A. Inclusion of New York Arrests on the INS's "Special Interest" List Requiring Clearances

Despite the elaborate system developed by INS Headquarters to identify and process aliens arrested in connection with the PENTTBOM case, INS officials in Washington, D.C. discovered – almost by accident – a large number of "special interest" cases not included on its Custody List that required clearances before release. By the end of October 2001, officials at INS Headquarters determined that the FBI's New York Field Office was maintaining a separate list of approximately 300 detainees arrested in connection with the PENTTBOM investigation, most of whom were not on the INS Headquarters's Custody List. These aliens were arrested on immigration charges in the New York City area by INS agents working with the New York JTTF. The names had been provided to the FBI's New York Field Office, but had not been reported to the INS NSU as required by the Operational Orders issued by INS Headquarters, which we described previously in this chapter. By the time officials at INS Headquarters became aware of these additional detainees, many already had been detained for several weeks.

During discussions about what to do about the detainees on this separate New York list, officials at the INS, FBI, and the Department raised concerns about, among other things, whether the aliens had any nexus to terrorism. However, in the end, the New York list was combined with the INS Headquarters's Custody List because of concerns that without further investigation of these aliens prior to removal, the FBI could unwittingly permit a dangerous individual to leave the United States.

1. Background to the New York Custody List

As noted above, unlike elsewhere in the country, where detainee cases were individually assessed for placement on the national INS Custody List, the FBI New York Field Office decided that all aliens arrested in connection with a PENTTBOM lead would be investigated fully, regardless of the factual circumstances of their arrests. In the first weeks after the terrorist attacks, FBI officials in New York City created a list of every alien arrested in connection with a PENTTBOM lead, regardless of the circumstances of the arrest. New York FBI and INS officials agreed that the INS New York District would detain all of the aliens without bond until the FBI had a chance to fully investigate and clear each one. As discussed previously, prior to centralization of the clearance process at FBI Headquarters in October 2001, aliens were removed from New York's custody list only after receiving a clearance letter signed by Maxwell, the Assistant Special Agent in Charge of the FBI New York Field Office.

In early October 2001, an INS attorney in Newark forwarded INS Headquarters case names that the INS Newark District believed were on the

INS Custody List but that in fact were not on the list. This led INS representatives to the SIOC Working Group to realize that the INS in New York and Newark had not been reporting all PENTTBOM-related cases to Headquarters, as required by the Operational Orders.

INS officials convened a meeting on November 2, 2001, to discuss why its New York office had failed to report the names contained on this separate list of "special interest" detainees, given efforts at INS Headquarters to ensure that it would be aware of all "special interest" cases. According to notes from the meeting, the INS New York Assistant District Director for Investigations explained that the FBI could not determine its interest in a large group of aliens arrested in connection with the PENTTBOM probe. Therefore, the INS New York District had read Pearson's Operational Order 10 to mean that such cases not be forwarded to INS Headquarters.[43] During the meeting, Pearson asked whether the aliens in question had been initially held without bond, and he learned that they had been.

The OIG attempted to determine why the New York FBI and INS offices failed to keep FBI and INS Headquarters informed of all aliens who would be subject to the clearance investigation requirement. A variety of witnesses told the OIG that federal law enforcement organizations in New York City have a long history of taking actions independent of direction from their Washington, D.C., headquarters. Several witnesses pointed out that the U.S. Attorney's Office in the Southern District of New York and the FBI's New York Field Office have coordinated many major terrorism investigations in the United States, including the 1993 World Trade Center bombing and the African embassy bombings. Witnesses told the OIG that the U.S. Attorney's Office and FBI's New York Field Office were accustomed to functioning in a highly independent manner with little oversight from officials in Washington, D.C.

Discovery of a large group of PENTTBOM-related detainees who had to be cleared and who were unknown to INS Headquarters until mid-October 2001 presented a host of problems, and several persons told the OIG that the INS aggressively sought to prevent wholesale incorporation of the New York list of approximately 300 detainees into its "INS Custody List." By this time, INS officials already were concerned about the slow pace of FBI clearances even though the SIOC Working Group was only dealing with 200 detainee cases. Moreover, INS officials were concerned about such a merger's impact because the New York list indicated that 85 cases were "unassigned," meaning no FBI agents were working clearance investigations for these detainees. In addition,

[43] Operational Order 10, issued by Pearson to all INS field offices on September 22, 2001, instructed INS field agents to exercise "sound judgment" in determining whether circumstances required immediate arrest and detention of aliens, and urged the agents to limit arrest to those aliens in whom the FBI had an interest.

contemporaneous notes indicate that at least one INS Headquarters official was concerned about how it would look when the Department's statistics regarding the number of September 11 detainees doubled overnight.

2. Merger of Lists

On October 22, 2001, the Senior Counsel in the Deputy Attorney General's Office who worked on immigration matters, an attorney from the Terrorism and Violent Crime Section (TVCS), two attorneys from the Department's Office of Immigration Litigation (OIL), an attorney from the FBI's OGC, and the Unit Chief of the FBI ITOS staff met with INS staff to discuss the problems presented by the New York list. The INS sent multiple representatives to the meeting, including Victor Cerda (Commissioner Ziglar's Chief of Staff), INS Deputy General Counsel Dea Carpenter, and others. Notes taken at the meeting by an INS attorney reflect that INS officials argued vehemently against subjecting all September 11 detainees on the New York list to the full FBI clearance process because, among other things, the clearance investigations were not being expeditiously completed.

According to meeting notes, Carpenter also stated that the Department might be subject to "Bivens liability" if it did not release the New York detainees in a timely manner.[44] Another person at the meeting commented that the INS could not hold the detainees "forever." One of the INS attorneys at the meeting who was in the SIOC Working Group noted that the recent reassignment of a helpful FBI special agent had brought the information flow from the FBI to the INS to a "grinding halt," further delaying the clearance process. Among the issues raised at the meeting was the Department's requirement that CIA checks be completed on all detainees before they could be released.

A similar group held a follow-up meeting at the FBI's SIOC on November 2, 2001, to continue discussing what to do about the separate New York list. Associate Deputy Attorney General Levey attended the meeting, along with representatives from INS OGC; Cadman, the Director of the INS's NSU; Cerda; and attorneys from the INS's Bond Unit, OIL, and TVCS, among others. Raymond Kerr, the Supervisory Special Agent in charge of the I-44A squad in the FBI's New York Field Office, participated by speakerphone. Contemporaneous notes taken by participants and subsequent OIG interviews indicate that the meeting was very contentious. According to the notes, INS officials expressed a wide range of concerns during the meeting, including the fact that FBI clearance checks on the detainees were not timely, that the INS

[44] In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that damages may be obtained for injuries stemming from violation by a federal official of a person's Fourth Amendment right to be free from unreasonable search and seizure.

had insufficient evidence for upcoming bond hearings, and that Immigration Judges already had ordered certain September 11 detainees to be removed from the United States. When an INS official complained that the INS could not continue to hold the detainees, Levey responded that the INS needed to be patient. According to the notes, Levey said that he did not expect INS to wait months for the results of the clearance checks, but that the INS could wait four to five days for the CIA checks. The group also discussed resource problems at the FBI and INS, as well as ways to improve the flow of information between the two agencies.

According to the notes of the meeting, FBI Supervisory Special Agent (SSA) Kerr said the time frame for assigning a September 11 detainee case to an FBI agent for a clearance investigation was a few days. He urged Levey to direct that all the detainees on the New York list continue to be held without bond until cleared. Notes taken by a participant at the meeting summarized the conflict: "In NY, all people FBI picks up on pentbom [sic] get held no bond. Everyone else, INS exercises a little discretion, looking for a scintilla of evidence, to justify no bond."

Cerda argued that the New York list should not be added wholesale to the INS's Custody List. He explained that the INS did not want to begin treating all the detainees on the New York list under the more restrictive INS policies applicable to September 11 detainees. He stated that, for the most part, detainees' placement on the list meant they did not get off for a long time. During the meeting, at least one INS official suggested dispensing with CIA checks for detainees who otherwise had been fully cleared by the FBI. Levey told the group that the Criminal Division favored the CIA checks and that he would need to check to see if any detainees could be released without the CIA check.

At the conclusion of the meeting, Levey decided that all the detainees on the New York list would be added to the INS Custody List and held without bond. In explaining his decision later to the OIG, Levey said he wanted to err on the side of caution so that a terrorist would not be released by mistake. He also stated that he had received a commitment from the FBI to "expedite" its investigation of everyone on the list, and a promise that the FBI would "analyze" all the detainees within one or two weeks. The FBI OGC attorney present at the November 2 meeting said she does not recall making, or hearing Kerr make, such a commitment. Kerr told the OIG that, while present at the November 2 meeting, he may well have committed to assigning the case within a short time frame but he does not recall making a commitment to expedite all the cases or analyze all the cases within two weeks. The notes of this meeting provided to the OIG by INS and TVCS officials contain mention of Kerr's commitment to assign the "unassigned" cases to agents within a few days, but make no mention of a commitment to "expedite" the investigations or of any promise to "analyze" the cases within one to two weeks. According to

contemporaneous notes from the meeting, Cerda stated at the end of the meeting that the "INS position is that we don't want to 'no bond' the NY list. But we will comply with the no bond policy."

As a result, on November 2, 2001, the INS Custody List contained 185 active INS cases and 34 inactive cases (meaning 34 detainees had been cleared). On November 5, 2001, after the New York cases were added, the INS Custody List contained 440 active and 41 inactive cases. The addition of the New York cases to the INS Custody List made the task of removing people from the list "unmanageable," according to one INS participant at the meeting, and it clearly had the effect of slowing the clearance process.

B. Delays in the Field Portion of the Clearance Investigation

According to members of the I-44A squad, reassignment of FBI agents to other duties contributed to delays in detainee field investigations. Kerr, the Supervisory Special Agent in charge of the I-44A squad, said he consistently requested additional resources for clearance investigations but was told they were unavailable, and that he had been given all the resources that could be spared, given the many priorities assigned to the FBI. For example, during the fall of 2001 and the spring of 2002, the FBI Newark Field Office had been assigned a substantial amount of work in connection with the anthrax investigation and the Daniel Pearl kidnapping in Pakistan. The FBI Philadelphia Field Office had responsibility for the Fresh Kills landfill on Staten Island, where officials were examining debris and remains from the World Trade Center. In addition, FBI agents were assigned to investigate the crash of an American Airlines flight in Queens on November 12, 2001, while other agents were sent to Salt Lake City in early 2002 to help with security at the Winter Olympics.

In addition, during some clearance investigations, FBI agents uncovered information that Maxwell, the Assistant Special Agent in Charge of the New York Field Office, thought warranted review by the New York JTTF. In those cases, FBI agents transferred the files to the JTTF. The documents we reviewed showed that the files often were not returned to the I-44A squad for many months.

Moreover, the method by which the FBI managed the clearance investigation process affected the timeliness of these investigations. According to the members of the I-44A squad, once the FBI investigated a lead and the INS arrested an individual in connection with that lead, agents generally moved on to the next lead rather than taking time to investigate or clear the person arrested. Furthermore, we found that FBI Headquarters did not impose deadlines on squad members or other FBI agents to complete September 11 clearance investigations.

We also found instances in which I-44A squad supervisors did not prioritize clearance investigations, even in response to ECs from FBI Headquarters alerting the FBI New York Field Office about upcoming detainee bond hearings. FBI agents working in the I-44A squad said they never were told about any time limits with respect to the INS's authority to detain these aliens without bond. While an FBI member of the SIOC Working Group was designated to serve as liaison to the I-44A squad, that person changed in mid-November 2001. The INS New York District liaison to the I-44A squad changed frequently, according to the squad supervisor. Consequently, the flow of information from the SIOC to the I-44A squad and from the FBI New York Field Office to INS Headquarters staff concerning the status of individual detainee clearances was, in the INS's view, sporadic at best.

C. CIA Name Checks

Several FBI and INS officials interviewed by the OIG expressed frustration with the CIA checks required by FBI Headquarters. For example, Kerr told the OIG that he believed his office had the ability to conduct an adequate clearance investigation using its own contacts at the CIA and its long-standing experience investigating al Qaeda and other related terrorist groups. Within the INS, the frustration came not so much from who handled the CIA checks but rather how long it took.

According to INS officials, the FBI told them that the CIA name check played a major role in delaying completion of detainee clearance investigations for September 11 detainees. Cerda, the INS Chief of Staff, told Levey that the CIA name checks were causing delays in the clearance process. As a result, Levey attempted to facilitate an expedited CIA name check that would meet the Department's desire to ensure that dangerous individuals were not released, but would not cause unreasonable delay.

Consequently, representatives from the CIA, FBI, INS, and the Department met at the FBI SIOC on October 23, 2001, and agreed that an expedited name check would be sufficient to meet the FBI's needs. On October 29, 2001, the CIA's Litigation Division Chief sent a draft letter to Levey that outlined the new, expedited process. The Litigation Division Chief explained that the FBI would send a cable to the CIA with detainee names, in priority order, together with required identifying information. The CIA agreed to check its main database for each name and provide copies of the search results to the FBI, including a summary of any "derogatory" information, on an "expedited basis." Levey said he was told this expedited name check could be accomplished in 48 hours. An FBI agent in the SIOC Working Group told the OIG that he was told the CIA checks should take only a "few days."

This check of the CIA's main database was a less thorough search than had been pursued in the past at CIA Headquarters. The new process required

only that the raw information be summarized by the CIA, rather than requiring the FBI to review the files itself. Under the plan, FBI and Criminal Division attorneys would review the initial CIA summary information and send the CIA a letter identifying any individuals for whom they wanted the CIA to conduct a broader database and records search. The letter from the CIA stated that the more thorough search, which would be initiated only upon receiving a specific request, in most cases would take approximately two weeks.

Yet, despite the new, expedited procedures, several FBI and Department officials we interviewed stated that there continued to be a substantial delay in the CIA's response to requests for name checks on the September 11 detainees. Several officials argued this was a big part of the reason why the clearance process for September 11 detainees continued to take so long. According to CIA officials, after the Department and the CIA developed the expedited name check process, the CIA's initial checks for September 11 detainees were completed within approximately eight days. However, our analysis did not substantiate this claim.

First, in a number of instances, we found the CIA's response was delayed due to a failure by the FBI or INS to submit complete information. We found multiple instances in which the CIA responded that it was waiting on the INS Form I-213 (the INS's arrest report) in order to complete the check.[45] CIA staff interviewed by the OIG noted that the cables received from the FBI often did not contain adequate identifying information on the detainees, thereby making the searches more difficult and ultimately less helpful. For example, a November 26, 2001, letter from the CIA OGC to Levey and the Chief of the FBI OGC's National Security Law Division explained that the FBI name check requests "do not provide all of the information upon which we agreed during our meeting." The letter explained that the information from the INS Form I-213 allowed the CIA to more quickly discard nonresponsive hits on similar names, thereby improving the response time. The attachments to the letter demonstrated that the FBI had failed to include information from the INS Form I-213, as agreed, and had also failed to prioritize the names.

Second, we found that the substantial delays in many of the September 11 detainee clearance investigations were attributable to delays at FBI Headquarters, not because of delays in CIA name checks. In many cases, the OIG found that the CIA provided the FBI with the results of its name check months before FBI Headquarters cleared the detainee. The OIG's review of 54 detainees' files showed that the CIA was not responsible for clearance delays.[46]

[45] A blank copy of Form I-213 is attached as Appendix F.

[46] The OIG sample consisted of 54 detainees from the INS Custody List who were identified by the INS as having been held more than 90 days as of January 23, 2002.

In these 54 cases, the CIA responded in just over 2 weeks on average. In 18 of 54 cases, the CIA responded within 8 days. While these times slightly exceeded the time frame the Department anticipated during discussions at the October 23, 2001, SIOC meeting, the response times do not seem unreasonable, given that the Department sent up to 190 names to the CIA at one time.

In contrast, we found that the FBI took months to analyze the information after receiving a response from the CIA. In 36 of the 54 detainee cases in our sample, the records reflect an average of 54 days between when the FBI received the CIA name check information and when it cleared the detainees. In all 36 of these cases, the aliens ultimately were cleared. In 14 of these 36 cases, the CIA had responded that either there were no records of the individuals in its databases or the information they had was "not identifiable" with the detainees.[47] In 22 cases, the FBI received some information but deemed it "not identifiable" with the detainees. In the remaining 18 of the 54 cases, we were unable to determine the time it took to analyze this information, due to insufficient data in the file.

In most instances, we found that Rolince, the ITOS Chief in the FBI's Counterterrorism Division, issued the detainee's clearance letter shortly after receiving an EC from the Supervisory Special Agent assigned to evaluate the CIA information that affirmed there was no identifiable CIA information on the detainee. Consequently, it appears that failure by the FBI to provide sufficient resources to review the CIA name check results in a timely manner significantly delayed the issuance of detainees' clearance letters.

The FBI OGC attorney assigned to the SIOC Working Group explained to the OIG that she recognized that she and her fellow OGC attorneys could not evaluate the CIA cables themselves, because they lacked the expertise to do so, and the personnel in the SIOC assigned to the detainees did not have adequate resources to handle the analysis. She alerted her superior, FBI General Counsel Larry Parkinson, who contacted the Deputy Executive Assistant Director, Tim Caruso. Caruso then contacted the Chief of the National Domestic Preparedness Office, Tom Kinnally, which was part of the ITOS. Kinnally assigned two SSAs from that unit to assist with and oversee the analysis of the CIA information. One of the SSAs told the OIG that, at the time, every member of her unit was working on a "critical" assignment, including work related to the anthrax investigation. She said she and the other SSA were assigned to do the CIA checks full time beginning in late November 2001, but later in December they also were assigned to work on the creation of a

[47] According to an FBI analyst who reviewed the CIA name check results at FBI Headquarters, "not identifiable" meant that "based on information available, it cannot be determined if the subject is, in fact, identical to CIA file references."

document exploitation unit. Beginning in approximately January 2002, 2 special agents were detailed to the CIA name check project for 30 days at a time. While this provided some help, it also required new agents to be trained on the project every month.

Moreover, we found that these resources were insufficient to permit the group to analyze the CIA information in a more timely manner for a number of reasons. First, according to one of the SSAs assigned to the project, the volume of cases was simply too great. One of the FBI requests to the CIA for information contained the names of 190 detainees. Second, the SSA pointed to many technical difficulties and "growing pains" they faced when they first started in late November 2001. For example, they had to find a person who had access to and was trained on the computer system that contained many of the documents they needed. According to the SSA, it took "several weeks" to get things in place and running. Third, many of the people working on this project were not focused exclusively on this task, due to the many demands on the FBI. Finally, some of the cases required contacting FBI offices overseas or other agencies, which took time, especially because the FBI offices in the Middle Eastern countries also were over-burdened at the time.

The SSA also stated that, despite all the efforts made to carefully evaluate the CIA information, for the most part it was almost impossible to determine if the information provided by the CIA was identifiable with the detainee. Even if the name was the same or quite similar, many of the names were common and the lack of other identifiers beyond names made connecting the information to the detainees nearly impossible.

The SSA explained that the group of agents and intelligence analysts assigned to the project attempted to prioritize its work so that those with final orders of removal or other issues could be dealt with first. Cases were sometimes brought to their attention that were "priority" due to a court date or order of removal.

In late November 2001, INS Chief of Staff Cerda contacted Levey by e-mail to complain again about the timeliness of the CIA checks. He stated that 157 September 11 detainees who otherwise had been cleared by the FBI were "in limbo" while waiting for CIA checks. He asked Levey whether the Department would reconsider its policy to require CIA checks under these circumstances.[48]

[48] This demonstrates the misperception held by many people, including some at the INS, who incorrectly attributed delays in the clearance process to unresponsiveness by the CIA rather than at FBI Headquarters.

By the time Cerda raised this concern, even Fisher, a Criminal Division Deputy Assistant Attorney General and a member of the SIOC Working Group who initially imposed the CIA check requirement, was willing to reconsider the issue. In a November 29, 2001, e-mail to TVCS supervisors, Fisher wrote, "I guess my initial view is that we should triage at this point, rather than scrap the system. Let's hold on people where we have other [negative] information until the CIA checks go through. Let's get a CIA list with priority. And for those who are ready to be deported and we have no other [negative] info, let's let them be deported if CIA can't check, as a last resort."

Levey told the OIG that he did not feel comfortable making the decision about Cerda's request to change the CIA check policy without additional input, so he consulted David Laufman, the Deputy Attorney General's Chief of Staff. Levey told the OIG that Laufman advised him to continue to require CIA checks, and Levey said he communicated this decision to Cerda by e-mail. Laufman told the OIG that while he did not recall specifically being asked by Levey about the CIA check policy, he did not dispute Levey's claim that they discussed the matter. Laufman also stated that there could be "catastrophic consequences" if the Department turned one person loose it should not have.

Levey said that even after the decision to keep requiring CIA checks, he continued to try to expedite the CIA check process. Ultimately, however, the decision to require CIA checks and FBI clearance before a September 11 detainee could be removed from the country was changed. On February 6, 2002, based upon the FBI's re-evaluation of the "hold until cleared" policy, Levey changed the Department's policy that up to that point required formal clearance from both the FBI and CIA before removing a detainee. Neither the FBI nor the Criminal Division opposed the change. This reversal is described in detail in Chapter 6 of this report.

D. Examples of Delays

The following are examples of how delays in conducting clearance investigations affected individual September 11 detainees:

- An alien arrested in early October 2001 in the New York City area had been employed by a Middle Eastern airline, although not as a pilot. The alien, who entered the United States as a crewman, had been ordered removed from the country in 1995. His appeal of that order had been dismissed in 1996. In October 2001, he was arrested based on a lead received by the FBI indicating he was employed in the airline industry. On the Form I-213 completed on the day of his arrest, the INS special agent indicated, "FBI Trenton stated there is no reason to delay with removal of the subject." The alien was nonetheless placed on New York's "special interest" list because he had been arrested on a PENTTBOM lead

stemming from his previous employment in the airline industry. In mid-October 2001, FBI agents interviewed the alien, one of his relatives, and his previous employer. On November 21, 2001, the FBI agent assigned to the SIOC Working Group sent an EC to the Special Agent in Charge of the FBI Newark Field Office requesting information about the detainee, stating:

> [A]ll response ECs should contain a statement from the SAC or his/her designee stating whether the FBI has an investigation [sic] interest in [the] detainee. If a field office does not have an investigative interest in a detainee, the response EC should state this fact and request that Project INS/FBI Detainee conduct appropriate CIA name checks. Once the no interest EC is received from a field office and CIA name checks are completed, a letter will be generated to INSHQ advising of FBI's no interest if the name checks do not provide information of investigative interest.

The EC contained no specific deadline for a response, although it had a precedence of "Immediate" and requested the information "as soon as possible."[49] We could find no response from the FBI Newark Field Office. In early December 2001, FBI Headquarters requested that the CIA conduct a name check for the detainee. In mid-December 2001, FBI Headquarters sent a follow-up EC to the FBI Newark Field Office, also with a precedence of "Immediate," again requesting the "interest/no interest" assessment. Before it received a response to this second EC, FBI Headquarters received the results of the CIA name check that found "no identifiable information" in connection with the detainee. The CIA response arrived 17 days after the FBI requested the name check. This detainee's name subsequently appeared on a list of detainees held more than 90 days that the INS forwarded to the Office of the Deputy Attorney General during the third week of January 2002. Within a week of the detainee's name appearing on this list, the FBI Newark Field Office provided FBI Headquarters with an EC stating it had "no interest" in the detainee and, based on that information, FBI Headquarters produced a clearance letter indicating that the INS could remove the detainee.

[49] FBI ECs have a line marked "precedence" that can be designated "immediate," "priority," or "routine." The FBI Investigative Manual states that the "immediate" designator is to be used when the addressee(s) must take prompt action or have an urgent need for the information. Immediate teletypes require approval by the special agent in charge, division head, or their designated representative (at FBI Headquarters) and must be given preferred handling. The FBI Investigative Manual states that "priority" is used when information is needed within 24 hours, while "routine" is used when information is needed within the normal course of business.

Thus, it appears that the FBI completed all field investigative work within three weeks of the detainee's arrest. The CIA check, which was negative, took slightly more than two weeks. Yet the detainee was not cleared for nearly four months. Based on the FBI Newark Field Office's and Headquarters's records in connection with this case, there does not appear to be any justification for the three-and-a-half-month delay in clearing this detainee. Furthermore, the timing of the clearance suggests that the reason the FBI finally cleared him was due to his inclusion on the list forwarded by the INS to the Office of the Deputy Attorney General.

- A Middle Eastern man in his 20s was arrested on August 30, 2001 – more than a week prior to the terrorist attacks – for illegally crossing the border from Canada into the United States without inspection. After the September 11 attacks, the alien was placed on the New York "special interest" list even though a document in his file, dated September 26, 2001, stated that FBI New York had "no knowledge" of the basis for his detention. FBI Headquarters did not request a CIA name check on the detainee until November 8, 2001. The name check came back negative 13 days later, but the clearance letter was not issued until December 7, 2001. The alien was removed in late February 2002.

- A Muslim man in his 40s, who was a citizen of [redacted], was arrested after an acquaintance wrote a letter to law enforcement officers stating that the man had made anti-American statements. The statements, as reported in the letter, were very general and did not involve threats of violence or suggest any direct connection to terrorism. Nonetheless, the lead was assigned to a special agent with the JTTF and resulted in the man's arrest for overstaying his visa. Because he had been arrested on a PENTTBOM lead, he automatically was placed in the FBI New York's "special interest" category.

 Within a week, the New York FBI Field Office conducted a detailed interview of the detainee. By mid-November 2001, the Field Office concluded that the detainee was of no interest. However, FBI Headquarters did not request a CIA name check until December 7, 2001. In addition, FBI Headquarters failed to include the INS Form I-213 with its request to the CIA, even though the FBI Field Office's records reflected that the FBI had a copy of the detainee's Form I-213 in its file. A CIA response to the FBI's request, dated late February 2002, indicated that the detainee's case was one of those "pending 213s from 12/7." The response also indicated that the CIA found "no identifying information" about the detainee in its databases. FBI Headquarters issued the detainee a clearance letter the next day. Thus, it appears that this alien, who was cleared by the New York FBI Field Office by mid-November

2001, was not cleared by FBI Headquarters until late February 2002 due to an administrative oversight.

E. Knowledge of the Delays in the Clearance Process

At the end of September 2001, an attorney from the Criminal Division's TVCS, who was also a member of the SIOC Working Group, raised concerns to his superiors that the FBI lacked adequate resources to conduct detainee clearances in a timely manner. In response, the Principal Deputy Chief of the TVCS drafted a memorandum in late September or early October 2001 from Assistant Attorney General Chertoff to Dale Watson, then the Assistant Director of the FBI's Counterterrorism Section. The draft memorandum requested that each FBI field office designate at least one agent to promptly interview September 11 detainees held in that district, and urged that these interviews be conducted on a "priority basis." The memorandum also requested that "[s]ufficient resources must be allocated in SIOC to provide notification to field offices of detainees and bond hearings in their districts and to facilitate the exchange of information to the INS attorney who will appear at the bond hearing. Currently, one person is handling this responsibility for all detainees and detention hearings with only intermittent assistance." Finally, the draft memorandum noted that "It is important that these aliens in detention are handled appropriately to make sure that those who are of investigative interest continue to be detained and those who are not of investigative interest are handled by the INS in the manner that similarly situated aliens would be handled."

After reviewing the draft memorandum, the TVCS attorney sent a typed note to the Chief and Deputy Chief of TVCS saying he believed that the FBI Director would "want to know that the field isn't getting the job done." He added, "To be candid, we are all getting screwed because the Bureau's SACs haven't been told explicitly they must clear, or produce evidence to hold, these people and given a deadline to do it." He suggested that the way to resolve the problem was to "get to [FBI Director] Mueller or [Deputy Director] Pickard, and have them direct the SACs to interview, run checks and clear or recommend holding people within 24 hours and direct necessary HQ personnel to clear NLT [no less than] 24 hours after that."[50] He told the OIG the purpose of his typed

[50] The attorney also wrote in his note, "We are sending INS into immigration court today to argue, in essence, that he [the alien] be held without bond because of WTC [World Trade Center]." The TVCS attorney told the OIG that after reviewing the files of these detainees it was "obvious" that the "overwhelming majority" were simple immigration violators and had no connection to the terrorism investigation. He said continuing to hold these detainees was a waste of resources and could damage the Government's credibility to oppose bond or release in more meritorious detainee cases. He acknowledged that the only way to know "for sure" if these detainees were linked to terrorism was to conduct clearance investigations, but he argued that the Government must provide the resources for such an effort.

note was to "urge that the memo to the FBI be more blunt." He said, with respect to this note, that the FBI was not staffing the detainee cases with sufficient resources. According to this attorney, the Criminal Division eventually decided not to send the memorandum to the FBI.

When interviewed by the OIG, Chertoff said that while he was familiar with the contents of the draft memorandum, he did not know whether it was sent (it was not, according to other witnesses). Chertoff recalled orally raising the issue of the pace of clearance investigations with FBI Director Mueller and Assistant Director Watson, but indicated that during the first few months after the attacks he believed these issues related to the impact of the clearance process on bond hearings (as opposed to removal of aliens from the United States). Chertoff told the OIG that he later became aware of a delay in removing detainees when he received questions from Congress about this issue as a follow-up to his November 28, 2001, testimony before the Senate Committee on the Judiciary.[51]

Director Mueller said he did not recall hearing about any problems with the clearance policy until the spring or summer of 2002. He said he did not recall any expectation of how long the process would take, and he did not learn how long the process in fact was taking. At some point, however, he said he learned that it was taking more than a few days. He said he would have expected problems with the clearance process and the time it was taking to be handled at a level lower than him.

INS Commissioner Ziglar told the OIG that he called FBI Director Mueller on October 2, 2001, to discuss the INS's problems in obtaining timely clearances from the FBI. FBI Deputy Director Pickard returned the call. Ziglar said he told Pickard that the FBI was putting the INS in the awkward position of holding aliens in whom the FBI had expressed "interest" but then failing to follow through with a timely investigation. Ziglar said he told Pickard that unless the INS received written releases in a timely manner, the INS would have to start releasing September 11 detainees. Pickard, who retired from the FBI in November 2001, told the OIG that he did not recall this conversation with Ziglar. Further, he said that he had no recollection of any complaints from the INS regarding the pace of the FBI clearance process.

Ziglar also told the OIG that he contacted the Attorney General's Office on November 7, 2001, to discuss concerns about the clearance process, especially the impact of adding the New York cases to the INS Custody List. He initially called David Ayres, the Attorney General's Chief of Staff, but recalls

[51] Chertoff is apparently referring to this question posed by Senator Leahy: "Is the Department intentionally holding people in American custody even after they have been ordered removed?"

reaching David Israelite, the Deputy Chief of Staff. According to Ziglar, he alerted Israelite to the fact that September 11 detainee cases were not being managed properly and warned of possible problems for the Department. Ziglar told the OIG that he was frustrated at this time and felt powerless to resolve the situation because he had no authority over the FBI, which was responsible for determining which detainees were "of interest," who would be cleared, and when. Israelite told the OIG that he could not recall this particular conversation with Ziglar and did not recall any complaints from the INS during the fall of 2001 regarding the clearance process for September 11 detainees.

Ziglar said that based on these and other contacts with senior Department officials, he believed the Department was fully aware of the INS's concerns about the ramifications caused by the slow pace of the detainee clearance process. When asked why he did not press the issue with the Attorney General or the Deputy Attorney General, he acknowledged that at some point he should have "gone around the chain of command" directly to the Attorney General or the Deputy Attorney General, but he felt it would have been futile to approach them directly about these issues because he did not think the outcome would have been different.

Deputy Attorney General Thompson told the OIG that he had not been made aware of the slow pace of FBI clearance investigations. He said that had the INS alerted him to the time limits it believed were applicable, he would have contacted the FBI immediately. Thompson said he received regular briefings during this period regarding the INS in which he was assured that the immigration processes for the detainees were being handled "properly."

The Attorney General stated that he had no recollection of being advised that the clearance process was taking months, nor did he recall hearing any complaints about the timeliness of the clearance process or a lack of resources dedicated to the effort to clear detainees.

VI. FBI WATCH LIST

In contrast to the inefficient way that the clearance process for September 11 detainees on the INS Custody List was handled, the FBI handled clearances from another important list – its watch list – in a more efficient manner.[52] We briefly discuss the FBI's handling of this watch list to illustrate the differences in how the two clearance processes were handled.

[52] We have not analyzed legal issues that may be presented by the creation of such a list, nor have we determined whether the list itself was effective from an investigatory or public safety perspective.

The day after the terrorist attacks, the FBI began developing a watch list originally designed to identify potential hijackers who might be planning additional terrorist acts once air travel resumed. The FBI distributed the watch list to airlines, rail stations, and other common carriers to assist in its terrorism investigation.

The FBI developed two versions of the list. One contained a person's name and date of birth only and the other contained additional information. The information on the lists was updated once or twice daily. The FBI provided the name and date of birth list to common carriers such as Amtrak, bus companies, truck rental companies, and the National Business Aviation Association. By September 26, 2001, the list had grown from the initial names to several hundred. As word spread nationwide that such a watch list existed, various agencies requested that names be added to the list.

Kevin Perkins, the Inspection Division Section Chief at FBI Headquarters who coordinated the watch list, told the OIG that he immediately recognized that the existence of the list created risks that innocent persons not connected to terrorists would be unfairly implicated. He said he wanted to create a mechanism for limiting who was placed on the list and for removing people from the list as quickly as possible. Perkins recruited an attorney from the FBI's Office of General Counsel to assist with managing the watch list and asked the attorney to develop parameters for placing names on the list that followed the Attorney General's guidelines for opening a criminal case. The attorney prepared a one-page document called "Screening Characteristics for Lookout Lists" that set out three categories of persons to be placed on the list.

Perkins said the list eventually grew to as many as 450 people. At one point, Perkins's supervisor said he directed that no one could be added to the list without his authorization. When interviewed by the OIG, Perkins and the attorney assisting him said they became concerned that individuals were being placed on the list who had no connection to terrorists. For example, because the airlines use a "soundex" system to retrieve like-sounding names, this resulted in names ending up on the list as soundex matches to names that were entirely different. Perkins also gave an example where a group of entries on the list all had the same first initial and a common last name, with no additional information.

Perkins told the OIG that he quickly turned his attention from regulating who got on the list to working to get people off the list. He recruited a group of legal instructors stationed at the FBI Academy in Quantico, Virginia, to help manage the process. Perkins said he ensured that all of the names on the list were indexed and he created a file for each. He asked the legal instructors to take each file and review how each person got on the list and what work had been done by FBI field offices to follow up on any initial leads. He told the OIG

that he asked the legal instructors to review the sufficiency of the information and to run records checks for each person.

Perkins said that in some instances, removing people from the list was not difficult. For example, a [redacted] FBI field office had provided information that approximately 20 Arab men attended the same flight schools as the hijackers, so these men were placed on the list. Upon further checking, this information turned out to be inaccurate – the men had attended flight schools, but not the same ones as the hijackers. Consequently, the men's names were taken off the list.

By late October 2001, the FBI alerted its field offices that it had stopped adding names to the watch list. By the end of November 2001, Perkins said the team had reduced the watch list to 20 to 30 names, 19 of which were the names used by the hijackers (the FBI was uncertain whether they had used their real names).

VII. OIG ANALYSIS

The Department reacted swiftly to the attacks on the World Trade Center and Pentagon by launching a massive investigation in this country and abroad. Within a week of the attacks, the FBI had assigned more than 7,000 employees to the task of tracking down anyone who had aided the terrorists and attempting to prevent additional attacks. In the ensuing weeks, JTTF agents and other law enforcement officers across the country arrested hundreds of illegal aliens they encountered while pursuing PENTTBOM leads, whether or not they were the subjects of the leads. While it is beyond the scope of the OIG's review to assess the appropriateness of these law enforcement actions, we saw some instances of the detention of aliens that appear to be extremely attenuated from the focus of the PENTTBOM investigation.

The Department instituted a policy that all aliens in whom the FBI had interest in connection with the PENTTBOM investigation, no matter how tangential the connection, required clearance by the FBI of any connection to terrorism before they could be removed or released. Therefore, determining which of these aliens was "of interest" to the FBI's terrorism investigation became the first of a series of critical decision points. We found that often the FBI could not state whether or not it had an interest in a particular alien and therefore, out of an abundance of caution, the FBI labeled the alien of interest or of unknown interest, and consequently the INS treated the alien as a September 11 detainee who required clearance from the FBI before he could be released.

In fact, in New York City we found that the FBI and the INS made little attempt to distinguish between aliens arrested as subjects of a PENTTBOM lead and those encountered coincidentally. This lack of precision had

important ramifications for many aliens in the time they spent confined and the conditions of that confinement, as we discuss in subsequent chapters of this report.

We do not criticize the decision to require FBI clearance of aliens to ensure they had no connection to the September 11 attacks or terrorism in general. However, we criticize the indiscriminate and haphazard manner in which the labels of "high interest," "of interest," or "of undetermined interest" were applied to many aliens who had no connection to terrorism. Even in the hectic aftermath of the September 11 attacks, we believe the FBI should have taken more care to distinguish between aliens who it actually suspected of having a connection to terrorism as opposed to aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with a PENTTBOM lead. Alternatively, by early November 2001, when it was clear that the clearances could not be accomplished in a matter of days (or even weeks), the Department should have permitted the FBI and INS to review the cases and keep on the list only those detainees for whom there was some factual basis to suspect a connection to terrorism or to the PENTTBOM investigation.

We found that the information provided to high-level Department officials suggested that this "hold until cleared" policy was being applied to persons "suspected of being involved in the September 11 attacks." In practice, the policy applied much more broadly to many detainees for whom there was no affirmative evidence of a connection to terrorism. This disconnect should have been discovered earlier and should have caused a review of the manner in which detainees were being categorized.

We appreciate the difficulty of making a definitive and expeditious determination in many cases, and realize that in the weeks and months after September 11 law enforcement decided to err on the side of caution. However, the manner that these designations were applied to arrested aliens was in many cases weak. Moreover, the FBI failed to provide adequate field office staff to quickly conduct the detainee clearance investigations and failed to provide adequate FBI Headquarters staff to effectively coordinate and monitor the detainee clearance process. This contributed to the slow pace of the FBI's clearance process, which meant the FBI's initial determination of its "interest" had enormous consequences for the detained aliens.

We also found that the FBI's clearance process was understaffed and not accorded sufficient priority. Moreover, despite the belief at high levels of the Department that the clearance investigations underlying the "hold until cleared" policy could be and were being done quickly, we found that they were not. The average time from arrest to clearance was 80 days and less than 3 percent of the detainees were cleared within 3 weeks of their arrest.

We found several reasons for this substantial delay. Although initially the clearance process was handled exclusively at local FBI offices, the clearance decision was soon centralized at FBI Headquarters. While the desire to centralize these decisions was supportable, given the need for a consistent process overseen on a national basis, centralization delayed the clearance process.

Moreover, the FBI failed to devote adequate resources to the task. Agents responsible for clearance investigations were often assigned other duties and were not able to focus on clearance investigations. The result was that detainees languished on the list for weeks and months, with no investigations being conducted.

Another reason for the delay was the inclusion of all New York City detainees arrested in connection with PENTTBOM leads being placed on the INS Custody List and therefore requiring FBI clearance. While this decision also was supportable, given the desire not to release any alien who might be connected to the attacks or terrorism, the inclusion of so many detainees in the clearance process required the FBI to devote additional resources to the clearance task. This did not happen, and the inclusion of 300 new names on the list overwhelmed the resources of the FBI in conducting clearance investigations.

As part of the clearance investigation, the Department required CIA name checks for all September 11 detainees. While we were told that the CIA delayed conducting the checks, we did not find this to be true. We found that the CIA conducted the checks in a timely fashion and that the delays relating to CIA name checks resulted from inaction by the FBI in reviewing the checks, not delays by the CIA in conducting them.

In contrast to the untimely manner in which the FBI handled the clearance process for September 11 detainees, the FBI handled adding and removing names to its watch list in a much more timely manner. Although we did not conduct an in-depth analysis of the watch list, it is clear from our limited review that the FBI was cognizant of the need to expeditiously remove people from that list who should not be on it. By contrast, the FBI did not devote similar attention to clearing September 11 detainees who had no connection to terrorism. The handling of the watch list also demonstrates the benefits of placing an individual with operational authority and access to substantial resources in charge of a project of this nature.

The untimely clearance process had enormous ramifications for September 11 detainees, who were denied bond and also were denied the opportunity to leave the country until the FBI completed its clearance investigation. For many detainees, this resulted in their continued detention in harsh conditions of confinement, which we describe in the chapters that follow.

CHAPTER FIVE

THE DEPARTMENT'S "NO BOND" POLICY FOR SEPTEMBER 11 DETAINEES

This chapter examines the Department's "no bond" policy for September 11 detainees. We first provide background on relevant immigration law, including an overview of the charging, bond, and removal processes for aliens arrested for immigration violations. Next, we describe the Department's efforts to oppose bond for all September 11 detainees while the FBI conducted its clearance investigations. We also address the INS's efforts to comply with the policy, despite its concerns about the legal dilemma created by the lack of information for bond hearings.

I. BACKGROUND ON IMMIGRATION LAW

The INS has authority to arrest aliens if they are present in the United States in violation of immigration law. Aliens who were never lawfully admitted into the United States are labeled "inadmissible." Aliens who were lawfully admitted into the United States but failed to maintain their immigration status, overstayed their visa, or engaged in unlawful conduct are "removable" or "deportable." In either case, the proceeding that ensues is currently referred to as a "removal" proceeding. It takes place in the Immigration Court, a trial-level tribunal that determines whether an alien is in the United States in violation of law, and, if so, whether any waiver or benefit is available that would allow the alien to remain in the United States lawfully.[53] The Office of the Chief Immigration Judge coordinates the activities of the more than 220 Immigration Judges located in 51 Immigration Courts throughout the country. Decisions of Immigration Judges may be appealed to the Board of Immigration Appeals (BIA). Both the trial and appellate-level courts are components of the Department of Justice, under the authority of the Attorney General. In certain instances, aliens may appeal the decisions of the BIA to federal court.

Removal proceedings begin when the INS issues a "Notice to Appear" (an "NTA") to an alien detained on federal immigration charges. As we described in Chapter 3, the NTA, issued by an INS District Director, is the charging document in a civil immigration case. The INS serves the NTA on both the alien and the local Immigration Court.

[53] Removal proceedings are generally referred to as "section 240 proceedings" because they are governed by section 240 of the Immigration and Nationality Act, codified at 8 U.S.C. §§ 1101-1537.

The INS District Director is responsible for setting the initial bond for an alien. The alien can request a bond re-determination hearing before an Immigration Judge by marking a box on the INS Form I-286 "Notice of Custody Determination," which is served on the alien at the same time as the NTA.[54] In certain cases, aliens are not eligible for bond, but in most cases, according to the INS General Counsel, the INS must provide justification to support its position to hold aliens without bond.

Separate from the bond hearing, the alien is entitled to a merits hearing.[55] If the Immigration Judge orders removal and the alien does not appeal, the "order of removal" becomes final and the "removal period" begins. This removal period is the phase during which the INS arranges for the alien to be returned to the alien's country of citizenship. Under federal immigration statutes, the INS "shall remove the alien within a period of 90 days" from the date the order becomes final.[56] There are a number of reasons why removal may not be accomplished within that time frame, which the statute takes into account, such as aliens obstructing their return or a failure of the alien's home country to accept the alien's return. The removal period generally begins on the date the removal order becomes administratively final. Where an alien is being held for non-immigration reasons (such as when an alien is serving a criminal sentence), the removal period begins on the date the alien has finished his criminal sentence. The removal period can be extended if the alien fails to apply in good faith for travel or other documents necessary for his or her departure or takes other actions to prevent his or her removal.

According to the Immigration and Nationality Act, aliens who receive final orders of removal while being detained by the INS must continue to be detained during the 90-day "removal period."[57] Once the initial 90-day removal period is over, if the alien has not departed the country the alien "shall be subject to supervision under regulations prescribed by the Attorney General." The statute permits certain aliens to be detained beyond the 90-day removal period, including those whom the INS – through a delegation of authority from the

[54] See copy of Form I-286 at Appendix G.

[55] The merits hearing is held to determine whether the alien is removable, or whether the alien is entitled to relief that would permit the alien to stay in the United States despite the fact that the alien is technically removable, such as if the alien is eligible for asylum.

[56] 8 U.S.C. § 1231.

[57] "[D]uring the removal period, the Attorney General shall detain the alien." 8 U.S.C. § 241(a)(2) (emphasis added).

Attorney General – identifies as risks to the community or whom are unlikely to comply with the removal order.[58]

In the alternative, an alien can avoid an order of removal (and the negative consequences of such an order, including its 10-year ban on returning to the United States) by agreeing to voluntarily depart the United States. Aliens who accept "voluntary departure" may remain in custody pending departure or may be released.[59]

II. DEPARTMENT'S STRATEGY FOR MAINTAINING DETAINEES IN CUSTODY

As discussed in Chapter 2, after September 11 the Department was concerned about the possibility of additional terrorist attacks and the FBI immediately sought to shut down any "sleeper" cells of terrorists who might be preparing another wave of violence. The Department also wanted to ensure that the individuals it arrested as part of the PENTTBOM investigation would not be released to potentially cause additional harm, which led to the "hold until cleared" policy discussed previously. As Deputy Attorney General Thompson explained to the OIG, an individual arrested and detained posed no ongoing threat to the United States, and therefore law enforcement officials could focus on arresting others still at large who did pose a potential threat. Assistant Attorney General Chertoff told the OIG that, after the attacks, the Department almost immediately turned its attention to prevention, and that he and other top-level officials discussed using all legally available means to ensure that those who posed a danger would not be able to carry out further attacks.

The Attorney General told the OIG that, even though some detainees may have wanted to be released or may have been willing to leave the country, it was in the national interest to find out more about them before permitting them to leave. In addition, he said that the United States might want to share

[58] According to INS data, 48 of the 762 (6 percent) September 11 detainees had received a final removal order prior to their arrest as part of the PENTTBOM investigation. Some of these detainees had been released from INS custody and ordered to appear on a certain date to be removed, but had failed to do so. Consequently, a final order of removal already was in existence for them when they were arrested after September 11 in connection with the terrorism investigation.

[59] Certain aliens are not entitled to removal proceedings because they waived rights in advance of their arrival in the United States under the auspices of special programs, such as the Visa Waiver Program. Under the Visa Waiver Program, aliens from 28 specified countries may visit the United States for up to 90 days without first obtaining a visa. These aliens can be summarily returned to their countries if they are found to have violated the terms of the Visa Waiver Program.

the information with the country to which the alien would be removed. He also noted that in the past the Department had problems with persons who were released pending appeal of their removal orders, because a very high percentage of them became "absconders" who later could not be located to be removed.

Within the Office of the Deputy Attorney General, the official primarily responsible for oversight of immigration issues was Associate Deputy Attorney General Stuart Levey. He and two attorneys (one a Senior Counsel) who reported to him coordinated the Department's strategy to maintain control of the September 11 detainees until they were cleared by the FBI.

On September 27, 2001, the Senior Counsel in the Deputy Attorney General's office sent an e-mail to David Ayers, Chief of Staff to the Attorney General, that included a "strategy for maintaining individuals in custody." The first section of the document attached to the e-mail, "Potential AG Explanation," explained that the Department was using several tools to maintain custody of all individuals suspected of being involved in the September 11 attacks, which involved criminal charges and material witness warrants for those in the country legally and immigration charges for those in the country illegally. The document noted that the INS already had 125 persons "related to this investigation" in custody, and that these detainees were requesting bond hearings. It stated:

> In preparation for bond hearings for these individuals, the FBI and INS are diligently working to provide the INS attorneys in locations where these aliens are detained with all available information relating to the individual's risk of flight and dangerousness. Attorneys from the Criminal and Civil Divisions are participating in this process to coordinate the immigration proceeding with the criminal investigation and to prepare to defend against petitions for writs of *habeas corpus* that these aliens will almost certainly file. In addition, the Criminal Division is examining each of the cases to determine whether the person can be detained on criminal charges or on a material witness warrant if the person is ordered released from INS custody.

The second section of the document explained that detained aliens who were not satisfied with their initial bond or no-bond determination could request bond re-determination hearings. The document then described efforts the FBI and INS would make to ensure that the aliens in question would not be released on bond.

According to the document, the INS would be obtaining information relevant to the alien's risk of flight and dangerousness and would present that information to the Immigration Judge at the alien's bond hearing through proffers, documents, or witnesses. If only classified information was available

to establish the alien's dangerousness or risk of flight, the information would be used only as a last resort after high-level review of the case. If the Immigration Judge ordered the alien's release, the INS would "immediately" file a motion to stay that decision and would appeal the decision to the BIA. If the BIA ordered the alien released, the INS would refer the case to the Attorney General. According to the document, the Civil Division was preparing briefs in anticipation of having to oppose petitions that might be filed by aliens seeking release in federal court. The Department planned to argue that any such petitions filed before resolution of the aliens' bond hearings were premature, and it planned to appeal any adverse decision from a federal district court granting release to these aliens. The strategy noted that if any alien "believed to be involved in the September 11 attacks" was ordered released, the Criminal Division might still be able to obtain a material witness warrant.

Implementation of this strategy, as discussed in the following sections of this chapter, determined whether a September 11 detainee would be released on bond pending a hearing on his immigration charges.

III. INS EFFORTS TO MAINTAIN DETAINEES IN CUSTODY

The INS took a variety of steps to ensure that aliens arrested in connection with the PENTTBOM investigation would not be released until the FBI had determined that they posed no danger to the United States. INS District Directors made an initial custody determination of "no bond" for all September 11 detainees (since granting bond could have resulted in the release of aliens not yet cleared by the FBI). Second, INS Executive Associate Commissioner for Field Operations Michael Pearson issued a directive two days after the terrorist attacks instructing INS field offices that no September 11 detainee could be released without Pearson's written authorization. Third, officials at INS Headquarters created a bond unit to handle the September 11 detainees' cases. Fourth, INS attorneys requested multiple continuances in bond hearings for September 11 detainees in an effort to keep the detainees in custody as long as possible. We describe these actions in turn.

A. Initial "No Bond" Determination

One of the initial steps taken by the INS to ensure that the September 11 detainees would not be released was the requirement that District Directors across the country who made the initial bond determination for aliens charged under federal immigration law make custody determinations of "no bond" for all September 11 detainees. As explained above, an alien initially denied bond by a District Director has the right to request a bond re-determination hearing before an Immigration Judge. In response to the blanket "no bond" policy, many September 11 detainees requested bond re-determination hearings. Consequently, the INS had to defend the "no bond" determination at hearings

soon after the terrorist attacks. For example, 40 September 11 detainees had bond hearings scheduled during the week of September 24, 2001.

B. Pearson Order

Another aspect of the INS's efforts to maintain control of aliens arrested as part of the PENTTBOM probe immediately after the terrorist attacks was a directive issued by Pearson to ensure that no September 11 detainee would be released by the INS until "cleared" by the FBI of any connection to terrorism. By September 13, 2001, Pearson issued an order to all INS field offices – at INS Commissioner James Ziglar's request – directing that "Effective immediately, all persons arrested by the FBI, and turned over to the INS will not be released without written permission" from Pearson. In the initial period after the September 11 attacks, Pearson would not draft such a memorandum until he received a clearance letter from the FBI.[60]

C. Creation of a Bond Unit at INS Headquarters

To help INS field offices obtain evidence for the many bond hearings involving September 11 detainees, the INS established a Bond Unit at INS Headquarters in late September 2001. The unit, located at the FBI SIOC, consisted of six INS attorneys.

An e-mail sent by an INS National Security Law Division (NSLD) attorney to INS district offices on October 1, 2001, instructed all INS District Counsels to keep the Bond Unit informed of all bond hearings for aliens on the INS Custody List.[61] This e-mail explained that Bond Unit attorneys would be working with the FBI and Department attorneys to review FBI Headquarters's files for information that could be helpful at bond hearings for September 11 detainees. At the same time, the e-mail encouraged INS District Counsels to contact local FBI field offices to "ascertain if there is any information in the FBI file which could help INS maintain a successful 'no bond' position in litigation." The e-mail indicated that the FBI had agreed to work cooperatively with local INS District Counsels to provide "as much information as possible without compromising the WTC/Pentagon investigations." The e-mail also instructed the District Counsels to inform the Bond Unit of any information they obtained from FBI field office files so that the Bond Unit could review the information and "clear" it for use in a detainee's bond hearing. This was designed to ensure

[60] A sample of a "Pearson" memorandum is attached as Appendix H.

[61] INS districts employ District Counsels who have staff attorneys who represent the INS in immigration proceedings, including bond hearings.

that information used at such hearings would not compromise the ongoing September 11 investigation.[62]

D. Opposing Release at Bond Hearings

1. Concerns About Lack of Evidence for Bond Hearings and Impact of Delays in the Clearance Process

According to many INS officials we interviewed, implementing the Department's "no bond" position for every September 11 detainee quickly became very difficult. Owen ("Bo") Cooper, the INS General Counsel, said he was concerned whether INS attorneys facing bond hearings would have the evidence needed to support their effort to keep the detainees in custody. Several INS officials told the OIG that, at least initially, they expected the FBI to provide them with additional information to present at detainee bond re-determination hearings to support the "no bond" position. Instead, INS officials told the OIG they often received no information from the FBI about September 11 detainees and, consequently, had to request multiple continuances in their bond hearings.

On September 19, 2001, Cooper sent an e-mail to an INS Regional Counsel describing the problem and discussing his efforts to obtain more information from the FBI about September 11 detainees: "As for the information to support a no-bond determination, we are trying today to break through what has been an absence of information from the investigation to use in the immigration process." Other INS officials expressed similar concerns, even as late as the summer of 2002. In a June 27, 2002, memorandum, INS Deputy General Counsel Dea Carpenter stated, "It was and continues to be a rare occasion when there is any evidence available for use in the immigration court to sustain a 'no bond' determination." An INS District Director brought to INS Headquarters to assist with the detainee cases told the OIG that in many instances the FBI would base its interest in a detainee on the sole fact that the alien was arrested in connection with a PENTTBOM lead. Thus, even though from the INS's perspective it had no evidence to support a "no bond" position, INS attorneys were required to argue that position in court.

The SIOC Working Group helped draft what they referred to as "boilerplate" documents that INS Counsel could use to oppose bond for September 11 detainees. These boilerplate memoranda, which became known

[62] At the time, while the Department could close immigration hearings, thereby protecting the information discussed at those hearings, it did not have the ability to request a "protective order." On May 28, 2002, the Department published new regulations that allowed for "protective orders" for certain information disclosed during immigration proceedings, similar to the process used in criminal proceedings in which a pleading may be filed under seal. 8 C.F.R. § 3.46.

as "declarations," took the form of affidavits signed by FBI agents that described the PENTTBOM investigation and the general national security concerns related to individuals arrested in connection with the investigation. While some declarations had space for the document to be customized by inserting details related to the particular detainee in question, others did not. Beginning October 4, 2001, and continuing over the next two months, INS attorneys filed 89 declarations and similar "letterhead memoranda" opposing bond for September 11 detainees.

The INS's Bond Unit provided the OIG with examples of the problems caused by the lack of FBI information for detainee bond hearings. In one case, an INS attorney in the INS New Orleans District complained in an October 4, 2001, e-mail that the A-File of a detained Israeli citizen contained no basis for detention. Further, the attorney said that the FBI had, up to that point, failed to provide him any information about the detainee. The attorney requested assistance from INS Headquarters and raised the specter of "ethical and professional considerations" connected with arguing "no bond" under these circumstances.

In another example, Cooper noted on an October 1, 2001, printout of the INS Custody List that there had been "no single expression of interest" by the FBI for at least 12 of the detainees, 5 of whom were poised for a second bond re-determination hearing because the Immigration Court previously had granted a continuance. Cooper told the OIG that while these cases involved detainees who had been arrested on PENTTBOM leads, the FBI never affirmatively expressed an interest in them.

In another case, officials in the INS Miami District sent an e-mail to INS Headquarters on October 9, 2001, reporting that two detainees were scheduled for bond hearings the next day and "information has been received from local FBI liaison that the FBI may no longer be interested in these aliens." However, the head of the INS's NSLD responded to the Miami District officials that they should continue to oppose bond for the detainees because officials at FBI Headquarters indicated these two detainees had not yet been cleared.

Several witnesses told the OIG that the FBI also failed to provide the resources needed to efficiently manage the complicated and cumbersome process developed to obtain information relevant to bond re-determination hearings, get that information through the review process, and provide it in a format approved for use by INS attorneys at bond re-determination hearings. For example, a supervisor in the Department's Terrorism and Violent Crime Section wrote in an October 5, 2001, e-mail to Levey and others that she had been told that the FBI agent in the SIOC who coordinated the flow of information about detainees from FBI field offices to the INS would be assigned two additional staff members, but the agent had received only intermittent assistance. Other witnesses also told the OIG that they raised concerns about

the lack of FBI resources assigned to obtaining information for INS attorneys to use at detainee bond hearings.

In a "normal" immigration case (i.e., not involving a September 11 detainee), FBI field offices generally communicated directly with individual INS district offices to provide information. In these routine cases, INS attorneys would simply call FBI agents to testify at bond hearings to state why the alien should not be released. However, due to the sensitivity of the PENTTBOM investigation, the Department wanted to ensure that no evidence would be used in court unless it was approved at FBI Headquarters. In addition, FBI officials wanted the INS to avoid calling FBI agents to testify at detainee bond hearings, because they did not want aliens' attorneys to be able to inquire into other aspects of the Government's terrorism investigation. Consequently, officials developed a "vetting" process before any evidence could be used in a detainee's case: information was passed from FBI field offices to the SIOC Working Group to the INS Bond Unit to INS attorneys preparing for court hearings. We found that this process made it much more difficult and time consuming than normal for the INS to obtain evidence for detainee bond hearings.

2. Difficulties Presented by New York Cases Added to INS Special Interest List

The fact that hundreds of detainees "of interest" to the FBI had been arrested in the New York area but not initially reported to INS Headquarters (see Chapter 4, Section V(A)) created additional problems for the INS related to bond hearings. In dozens of these cases, INS attorneys initially had not opposed bond for the detainees and treated them as they would aliens arrested for immigration violations in "normal" cases unrelated to PENTTBOM. When these detainees were added to the INS Custody List, the INS was instructed to oppose bond for these detainees. In a November 7, 2001, e-mail to Pearson, INS General Counsel Cooper wrote:

> These are cases that had final unappealed bond orders from judges before they were added to the list (and therefore before there would have been any question of defending "no bond" determinations, appealing negative [Immigration Judge] decision, etc.). In these cases, there is no legal basis not to accept bond, and those aliens who offer to post bond should have that offer accepted and should be released. I have let [the Senior Counsel to the DAG] know that this is the case. (She agreed, by the way.) There are about 25 as of now.

In one case, an INS Regional Counsel advised an INS attorney facing an upcoming bond hearing that, "An alien's addition to the Custody List is not sufficient new evidence that would justify the District Director re-determining bond. General Counsel concurs in this view. Therefore, we are legally

obligated to abide by the [Immigration Judge] bond decision and must allow him to post and be released." This alien was released on bond two weeks later.

3. INS Attempts to Revise Bond Policy

Given the lack of information about detainees forthcoming from the FBI, the INS developed a process of automatically seeking continuances in bond hearings to give the FBI more time to investigate the detainees. According to Cooper, the INS understood that the FBI needed some time to conduct these clearance investigations. He also said he understood that the FBI considered maintaining custody of the detainees "necessary to its efforts."

However, by early October 2001, Deputy General Counsel Carpenter and others in the INS Office of General Counsel became concerned that their duty of candor to the Court created an ethical dilemma when INS attorneys argued that aliens be detained without bond and there was no evidence to sustain such positions. Consequently, as described below, the INS sought to modify the "no bond" policy to accommodate the Department's desire to hold detainees in custody for as long as possible without crossing the line into legally unsupportable territory.

a. Proposal to Revise Bond Policy

Cooper said he approached Levey the first week in October 2001 for approval to change the Department's "no bond" policy to avoid many of the problems INS attorneys were facing at detainee bond hearings due to lack of information from the FBI. Cooper proposed that INS attorneys would request a continuance at a September 11 detainee's first bond hearing. If at the time of the second bond hearing the INS still had not received any evidence from the FBI that could be used to argue against bond, the INS would not treat the detainee as if the alien were a "special interest" case and would only argue against bond if it believed the alien presented a flight risk, danger to the community, or any other characteristic commonly argued in "normal" bond hearings. According to Cooper's plan, in such a case the INS also would not attempt to intervene if the alien subsequently posted bond and was ordered released. The FBI opposed Cooper's proposal and any revisions to the "hold until cleared" policy.

Levey agreed to modify the "hold until cleared" policy, but apparently not to the extent the INS requested. Levey told the OIG that he believed the revised policy, described in the next section, adequately addressed the INS's concerns by permitting a detainee to be released on bond if the INS received no information from the FBI about the detainee after the second continuance. However, Cooper told the OIG that the revisions approved by Levey to the Department's "hold until cleared" policy did not include all of the changes he originally requested. Specifically, the revised policy did not allow the INS to

treat a September 11 detainee as a "normal" detainee if the FBI failed to provide information to support the "no bond" position. Instead, the INS still had to continue to oppose bond for all September 11 detainees unless the FBI specifically expressed "no interest."

b. Revised Bond Hearing Policies

On October 3, 2001, as a result of the discussions between Levey and Cooper, the INS's Office of General Counsel distributed an e-mail within the INS that described a "revised" policy for bond cases:

> The policy regarding bond conditions for aliens who are detained by the INS and who appear on the "INS Custody List" has been modified. The new policy is outlined below.
>
> New Position on List Cases:
>
> 1) If the alien is appearing for his/her first hearing and the alien is on the "INS Custody List" the [INS] should seek a continuance so that the Service can coordinate with the FBI to obtain evidence relating to the alien's no bond status. If the [Immigration Judge] denies the motion to continue and issues a bond, an emergency appeal/stay must be filed under the previously delineated policy.
>
> 2) If the Service has received a prior continuance in the case and the alien is still on the "INS Custody List" and subsequent to the alien's arrest the FBI has expressed no interest in the alien, the Service should proceed as with any other case by presenting the available evidence.
>
> 3) If the Service has received a prior continuance in the case and the alien is still on the "INS Custody List" and the FBI has expressed an interest in the alien beyond the initial arrest, the Service should seek an additional continuance so that it can continue to coordinate with the FBI to obtain any evidence relating to the alien in question. If the [Immigration Judge] denies the motion to continue and issues a bond, an emergency appeal/stay must be filed under the previously delineated policy. The Appellate Counsel's Office will assist with such filings and should be contacted as soon as possible to expedite this process.

Thus, under the revised policy, it appeared that the only cases in which the INS was not required to oppose bond were cases in which the FBI expressed "no interest" in aliens in connection with the PENTTBOM investigation. This expression of "no interest" still had to come from FBI Headquarters – expressions of "no interest" from FBI field offices continued to be insufficient.

However, officials in the INS General Counsel's Office told the OIG that either when the October 3 policy was disseminated or shortly thereafter they began to receive verbal "no interest" statements on particular detainees from FBI SIOC representatives, and they treated these verbal statements as expressions of "no interest" for purposes of the bond policy described above. Thus, between October 2001 and January 2002, a person with a "verbal no interest" statement from the FBI representative to the SIOC could be released on bond.[63] Nonetheless, these verbal "no interests" were not formal FBI clearances and were not sufficient to permit the INS to remove the detainees from the United States.

It later became apparent that the October 3 "revised" policy quoted above was silent as to detainees in whom the FBI had not expressed an interest "beyond the initial arrest" and who were appearing for their second bond hearing. In explaining how to handle these cases not addressed by the "revised" policy, Carpenter told an INS attorney handling a detainee bond hearing: "By the second bond hearing, if no evidence that the person poses a threat to national security exists and [FBI Headquarters] has not affirmatively indicated an interest in the person – our attorneys should treat this case no differently than any other case that is not linked to the events of September 11." This e-mail, sent on October 11, 2001, illustrated the conflict between enforcing the Department's "no bond" policy until the FBI cleared the detainee, and INS attorneys' advice not to oppose bond if the FBI did not express an affirmative interest. It also illustrated the mixed messages INS Headquarters was sending to its employees about detainee bond issues, ranging from Pearson's September 13, 2001, order not to release any detainees without his express authorization to advice from INS's Office of General Counsel not to oppose bond at a detainee's second hearing if no information was forthcoming from the FBI.

In the end, INS officials told the OIG that the October 3 policy changes offered little assistance because the INS continued to run into difficulty

[63] The FBI OGC attorney assigned to the SIOC Working Group told the OIG that in January 2002 she stopped issuing verbal "no interest" statements. Instead, she referred to all detainee cases as "pending" until FBI Headquarters issued a written clearance letter.

obtaining timely expressions of "no interest" from the FBI about individual detainees.[64]

E. Proposed Inter-Agency Memoranda

At the same time it was attempting to revise the Department's "no bond" policy, INS officials drafted four form memoranda it wanted to send to the FBI in an attempt to memorialize and expedite the clearance process for September 11 detainees. The first draft memorandum advised the FBI that a detainee who was held without bond had been placed in removal proceedings and noted that the detainee "may be of interest to the FBI" relative to its terrorism investigation. The memorandum had a space for listing the bond hearing date and requested "information necessary for the INS to determine whether it continues to be appropriate to argue before the Immigration Court that the alien should remain in custody without bond." If no such supporting evidence or testimony was provided, the memorandum said the INS would produce whatever information it had in its records for the Immigration Judge to make an appropriate custody determination.

The second draft memorandum requested an immediate update from the FBI on its interest in a specific September 11 detainee. It stated, "Absent any response within 24 hours of this notice, the INS will remove the alien's name from our Custody List and will process the alien according to normal procedures."

The third draft memorandum advised the FBI that the Immigration Court had set bond for a detainee and that, if the detainee posted the bond, the INS would be required to release him immediately. It noted that the detainee "may be of interest" to the FBI, but that the extent of the FBI's interest was unknown. The memorandum requested information from the FBI to support an attempt to reopen the bond proceeding.

The fourth draft memorandum advised the FBI that a particular detainee had received a final order of removal. Again, it noted that the detainee "may be of interest" to the FBI but that the extent of the FBI's interest was unknown. The memorandum concluded: "Absent further action on your part, we intend to remove the alien from the United States pursuant to the Order on (date)."

Victor Cerda, the INS Chief of Staff, faxed these draft memoranda to Levey on October 9, 2001, and requested approval to begin sending them to the

[64] Levey said he was not provided with a written copy of the "revised" bond policy prior to its issuance. He also expressed frustration that INS officials had not raised the matter with him again when the revised policy, as written, failed to address their concerns. However, INS officials told the OIG they believed the decision had been made, and the attorneys worked within the confines of the policy that they understood Levey approved.

FBI. Cerda told the OIG that he believed he needed to seek Levey's approval because the memoranda would have altered the Department's directive that no September 11 detainee could be released without first obtaining FBI clearance. While the first and third memoranda relating to the "request for information" and "order setting bond" did not substantially change the policy, the second and fourth memoranda would have altered significantly the existing process by permitting the INS to remove aliens who had final orders of removal without FBI clearance.

According to Cerda, Levey refused to allow the INS to use any of the memoranda and said there was no need to document the clearance process in this written fashion. Commissioner Ziglar told the OIG that he had a "clear recollection" of Cerda informing him about this telephone call with Levey and about Levey's statements regarding the memoranda. Levey told the OIG that he does not recall making the comment about not wanting the process to be documented. He acknowledged that the INS had been instructed to hold detainees until they were cleared by the FBI, a policy that would have been substantially altered if the INS memoranda were used. Levey said he opposed using the memoranda because he wanted to create a process by which the FBI and the INS worked together cooperatively. He said the documents created an "opposing counsel" type of relationship between two Justice Department agencies. Levey also told the OIG that during this period he understood the Department's position was that the INS's interests were "subservient" to the FBI's investigation, and that it was important to continue holding the detainees while the FBI investigated any possible connections to terrorism. However, Levey also stated that if INS officials believed the memoranda were essential, they should have approached him again to re-argue their position.

Levey told the OIG that he recognized that the process could not work well if the FBI failed to provide sufficient and timely information to INS attorneys to use at detainee bond hearings. He said he raised this issue with other Department officials, including Dan Levin, Counsel to the Attorney General. Levin told the OIG that he did not recall this discussion.

F. Impact of Pearson Order

Several witnesses told the OIG that Pearson's order directing that no September 11 detainee could be released without his written authorization created tremendous pressure on Pearson to make timely detainee release decisions. Some witnesses said it was difficult to contact Pearson to obtain timely decisions in detainee cases.

In order to address some of these problems, Pearson eventually orally authorized release of some detainees followed by a written letter. In addition, occasionally Pearson permitted his deputy to sign letters authorizing a detainee's release in his absence. However, these accommodations did not

address the dilemma faced by INS field offices that aliens ordered released on bond by an Immigration Judge could not be released without violating Pearson's order. One e-mail from a senior INS official stated, "[I]f bond is set as a condition of custody by the [Immigration Judge] in the hearing, it puts the district director and the [Office of Detention and Removal] staff in the position of either ignoring their orders from Pearson or taking sole responsibility for the continued detention of the alien in opposition to the [Immigration Judge]'s determination."

INS General Counsel Cooper told the OIG that he met with Pearson in October 2001 to argue that his order was creating potential legal liability for the INS, but the order remained in place. Cooper said he advised Pearson and other INS officials that refusal to accept bond on an unappealed bond order, if based solely on the need for a "Pearson" letter, was not legally defensible. Cooper said he also advised Pearson that he was instructing INS field offices not to continue holding aliens who attempted to post bond unless the INS had appealed the Immigration Judge's bond order. Pearson told the OIG that he attempted to address Cooper's concern by issuing release authorization memoranda in advance of detainee bond hearings. The advance release memorandum stated that in the event the Immigration Judge ordered the detainee released on bond, the INS District Office was authorized to release the detainee.[65] By receiving these letters in advance, the District Office would not have to seek out Pearson in order to obtain his approval to comply with the Judge's order.

The problem continued to arise, however, due to the difficulties in communication between INS field offices, INS Headquarters, and the SIOC. When Pearson continued to insist on the letters despite the continuing problems, Cooper went to Cerda, the INS Chief of Staff. Cerda told the OIG that he encouraged Pearson to ensure that the letters would be issued in a timely manner. But Cerda said he did not favor eliminating the requirement of a letter because the purpose of the letter was to ensure that a terrorist did not get released, and the letter served as a "check" to ensure that all the coordination with the FBI and the Department had occurred.

As a result, INS employees routinely faced the dilemma of choosing between following Pearson's directive or the INS General Counsel's advice. For example, an October 12, 2001, e-mail to Pearson from an attorney working on detainee cases for the INS's NSLD stated that INS Acting Deputy Commissioner Michael Becraft asked her to contact the SIOC to determine if the FBI had any interest in a particular detainee who had been ordered released on bond by an Immigration Judge. The attorney said she told Becraft that if the alien was not

[65] A sample of a Pearson "advance" release memorandum is attached as Appendix I.

released by the INS, "the individual making that decision could be held liable under a Bivens action." She said Becraft instructed her that, "If the FBI did not provide us with a 'no release' recommendation within 20 minutes of his call, the alien would be released." The attorney contacted the INS NSU's agent on duty, who called the SIOC. The NSU agent reported back to the INS attorney shortly thereafter that the alien was of no interest to the FBI, and the alien was released.

Cooper and Carpenter told the OIG that whenever they confronted a conflict between a detainee's unappealed final bond order and Pearson's directive, their advice was that INS was obligated to release the detainee, regardless of whether the FBI had completed its clearance review.[66] Carpenter noted that she provided this advice with reluctance, given that it was in conflict with the Department's "hold until cleared" policy. For example, an INS Newark District official sent an e-mail to an INS Regional Counsel on November 8, 2001, that he had just learned of a case in which the INS refused to release a detainee when his attorney attempted to post bond even though the Government did not appeal the bond order. The official wrote, "Frankly, I do not know what to tell him because I cannot bring myself to say that the INS no longer feels compelled to obey the law." The Regional Counsel forwarded the message to Cooper, noting that the District official clearly believed that he needed a letter from Pearson in order to release the detainee, even though the Regional Counsel had advised him to the contrary.

This dilemma continued to play itself out again and again as Immigration Judges granted bond for September 11 detainees. An e-mail sent to Carpenter on November 20, 2001, by an INS attorney discussed the case of a detainee whose attempts to post the $4,000 bond set in late October 2001 by an Immigration Judge in the Newark District were rejected because the detainee's name appeared on the INS Custody List. The detainee's name had been placed on the list as a result of the "merger" of the New York and INS Custody Lists discussed in Chapter 4. The detainee filed a *habeas corpus* petition on November 19, 2001, and was allowed to post bond two days later.[67]

[66] Cooper told the OIG that beyond offering advice to INS attorneys handling these cases that it was unlawful for the INS to continue holding aliens who posted bond when the INS had not appealed, he reached out to the Executive Director of the American Immigration Lawyers Association (AILA) and asked her to contact him if she became aware of any aliens caught up in this dilemma. In a number of instances, lawyers for September 11 detainees notified the AILA about their clients' bond problems, the AILA Executive Director notified Cooper, and Cooper worked through internal INS channels to obtain a letter from Pearson so that the aliens' bond could be accepted.

[67] *Habeas corpus*, which literally means "that you may have the body," refers to a legal pleading in which a federal court is requested to order a Government official to undertake a particular action. In this case, a federal judge would order the INS to release a particular detainee.

Carpenter recognized that her office and Pearson's office were giving INS employees conflicting advice. In a December 3, 2001, e-mail she explained that:

> We all recognize that there is a point at which the field will receive conflicting instruction from Genco [General Counsel] and Field Ops [Pearson's office] – that is where the attorneys are ethically bound (due to a lack of evidence) not to appeal or oppose the setting of a bond or voluntary departure. Where that does not coincide with the issuance of a Pearson letter – it appears as though the attorneys are telling the field to release someone without a Pearson letter. What the attorneys are really telling the field is that the agency must release someone when there is no appeal pending and the alien has posted (or is attempting to post) the court ordered bond – since it lacks the legal authority to continue to detain the person.

According to Cooper, about 30 detainees were caught up in the conflict between Pearson's order and advice from the General Counsel's Office to allow detainees to post bond, primarily in October and November of 2001, but even as late as April 2002. Cooper said that when confronted with this dilemma, the INS was able to secure clearances for these detainees from the FBI generally from a few hours to several days.

IV. OIG ANALYSIS

The Department decided immediately after the terrorist attacks to oppose bond for all aliens arrested in connection with the PENTTBOM investigation until they were cleared by the FBI, as a way to disrupt potential future terrorist attacks. As the weeks went by, two situations developed that should have led to a re-evaluation of this approach. The FBI's process for clearing September 11 detainees, originally envisioned as taking just a few days, was taking weeks and months. Also, as the Department learned more about the 762 September 11 detainees, the fact that many of these detainees were guilty of immigration violations alone, and were not tied to terrorism, should have prompted the Department to re-evaluate its original decision to deny bond in all cases.

The Department did not revise its approach for many months despite complaints by the INS about the problems it faced in bond hearings where it received no evidence from the FBI to tie the detained aliens to the September 11 attacks or terrorism. The INS raised the problem with officials in the Deputy Attorney General's office responsible for overseeing and coordinating INS issues. There is some difference as to whether this resulted in any substantial change in policy. Associate Deputy Attorney General Levey told the OIG that he thought he had addressed the INS's concerns by revising

the Department's bond policy. He believed the revisions were satisfactory to the INS, and thus the revisions permitted detainees to be released on bond if the INS received no information from the FBI after the detainees' second continuance. However, our interviews and review of INS documents show that the policy was not changed to permit the INS to change its "no bond" position after the second continuance if there was no evidence provided by the FBI. While this written policy may not have accurately reflected the understanding reached between Levey and Cooper, the INS General Counsel, the policy continued to require FBI clearance.

The policy continued to place the INS in the untenable position of opposing bond unless it obtained a sign-off from FBI Headquarters stating that the FBI had no interest in the detainee, which was exceedingly hard to come by in the months immediately after the terrorist attacks. Thus, the INS still had to argue for "no bond" even when it had no information from the FBI to support that argument.

Although the INS appropriately raised this issue with Levey and other officials in the Deputy Attorney General's office, it did not press the issue at a higher level, which we believed the INS should have when it recognized that the policy remained unchanged. At a minimum and at an early stage, it should have written a legal memorandum that clearly spelled out its concerns and its position. As we describe in the next chapter, when it did write such a memorandum in January 2002, the "hold until cleared" policy was changed.

The provision of prompt, accurate information from the FBI for use in the bond hearings would have minimized the problems that arose with the "no bond" policy. Had the FBI devoted more resources to field investigations of these detainees and more resources at the SIOC to relay that information to the INS in a timely manner, some of these problems might have been avoided.

In addition, we found that the process developed by the INS to gather and "clear" information for use by INS District Counsel in opposing bond for September 11 detainees was exceedingly cumbersome. Given the swift pace of bond hearings stemming from the INS's initial "no bond" position for all September 11 detainees, asking District Counsel (who had little time to prepare for these hearings) to contact INS Headquarters, wait for the INS Bond Unit to receive a response from FBI SIOC agents to its request for a search of FBI files (where the FBI SIOC agents had to contact their local FBI field office for additional information), and then wait for approval from the SIOC before any of this information could be used (even non-classified information) was very time consuming. Consequently, INS officials in field offices told the OIG that they appeared in court with very little information to oppose bond in September 11 detainee cases.

Finally, while we recognize the importance of having a final check to ensure that detainees are released according to Department policies, INS employees believed they faced the choice of either violating a direct order from a senior INS official or a valid, unappealed bond order issued by an Immigration Judge. Given that efforts to "anticipate" bond hearings and produce "advance" letters continued to be inadequate to address the situation, the INS should have either revised the Pearson order or developed a more effective means of ensuring that it did not cause INS officials to violate an Immigration Judge's order.

CHAPTER SIX

REMOVAL OF SEPTEMBER 11 DETAINEES

Federal law provides that, in general, aliens found to have violated immigration law shall be removed from the United States within 90 days of when the alien is ordered removed. This chapter examines the issues raised by the Department's decision to delay removal of detainees with final removal orders and voluntary departure agreements, even after the 90-day removal periods had expired. In addition, we review the adequacy of the INS "custody reviews" that are required for any detainee held more than 90 days after an Immigration Court has issued a final order of removal.

I. BACKGROUND

Section 241(a) of the Immigration and Nationality Act (INA) provides that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." 8 U.S.C. § 1231(a)(1)(A). The statute provides exceptions when removal within the 90-day period is not possible (such as when the alien's country of citizenship will not accept the alien). It also permits detention to continue beyond the 90-day period for aliens charged with certain types of immigration violations who have not been removed, or where the Attorney General determines that the aliens present a risk to the community or a risk of flight.[68]

As noted in previous chapters, the Department directed the INS to detain aliens arrested in connection with the PENTTBOM investigation until they could be cleared by the FBI of connections to terrorism. According to INS attorneys, the fact that the FBI clearance process took longer than the time needed by the INS to prepare to remove the aliens (to obtain travel documents and make travel arrangements) posed a significant legal issue for the INS.

Early on, INS attorneys believed that the delay in removing detainees created a legal problem for the INS and the Department and said that they highlighted these concerns in meetings with officials from the Deputy Attorney General's office. However, these Department officials assert that the INS did not inform them of its belief that it was detaining aliens in violation of the law until January 2002, and when these Department officials became aware of this concern they changed the policy shortly thereafter.

[68] 8 U.S.C. §1231(a)(6).

Whether an alien could be held within the 90-day period when the INS is ready to remove the alien, as well as whether the INS could hold an alien beyond the 90-day period in order to investigate the alien's possible ties to terrorism was the subject of differing opinions during the fall of 2001 and 2002. These issues are the subject of the Turkmen lawsuit, which is pending.[69] In a February 2003 opinion, the Department of Justice Office of Legal Counsel concluded that the INS can hold aliens beyond the 90-day removal period if the purpose is "related to effectuating the immigration laws and the nation's immigration policies."

This chapter describes the manner in which the issue was raised by those working on the detainee cases and concludes that the Department did not address the issue in a timely way. Once the legal issue was recognized by the Department as significant, however, the "hold until cleared" policy described in Chapter 4 was abruptly discontinued. In addition, we found many instances in which the cases of detainees held over 90 days were not reviewed, as required by the immigration regulations.

II. DISCUSSION OF THE LIMITS OF THE INS'S DETENTION AUTHORITY

INS General Counsel Bo Cooper and Deputy General Counsel Dea Carpenter told the OIG that after September 11, the INS operated under the belief that legally it had 90 days (the "removal period") within which to remove an alien who had a final order of removal. Cooper also said the INS believed it could only use the entire 90-day period if the full 90 days were being used to "effectuate the removal." In other words, Cooper believed the INS could not delay removal of an alien for a reason "not related to removal." For example, Cooper believed that if it took the INS 85 days to obtain travel documents and make flight arrangements for an alien, then the INS could use 85 days of the 90-day removal period. However, if an alien was ready to be removed on the 30th day after receiving a final order, but another agency conducting a criminal investigation of the alien seeks to delay his removal, Cooper said he believed the INS could not use the remaining 60 days in the removal period to delay the alien's departure.

According to Cooper, he believed such a delay would be impermissible because the removal period is for the purpose of removing an alien from the country, and a delay exclusively attributable to a criminal investigation is not a delay "related to removal." Cooper said that he believed that in such a case the INS had no authority to continue holding the detainee if removal could otherwise be effectuated. Cooper stated that he recognized that it was

[69] See Turkmen v. Ashcroft, 02-civ-2307 (E.D.N.Y. filed April 17, 2002).

"arguable" that consulting with another law enforcement agency to determine if custody should be transferred to that agency is "related to removal." Cooper told the OIG, however, that the slow pace of the FBI's detainee clearance process in the months after the September 11 attacks took the INS into "gray areas" in terms of its legal authority to continue holding detainees in custody, both within and beyond the 90-day removal period.

The conflict between the INS's interpretation of its legal authority to detain aliens with final removal orders and the Department's desire to maintain custody of these detainees until cleared by the FBI created a concern in the INS beginning as early as September 30, 2001, when an INS attorney noted that detainees with final orders wanted to leave and were ready to leave. A series of e-mails between the INS's three Regional Counsels and Carpenter reflected the INS's internal debate about how to interpret and apply the statute's 90-day requirement to this circumstance. The central question discussed in these e-mails was whether the INS had 90 full days within which to effectuate removal, or whether the INS had to effectuate removal as soon as possible, but prior to the expiration of the 90-day period. One Regional Counsel held the view that within the 90-day removal period, the INS did not need to have any reason to hold an alien who had a final order, and stated that delaying removal to obtain clearance from the FBI would constitute a legitimate reason for delay under the statute. Another Regional Counsel held the opposite view.

Attorneys from the INS and the Department's Office of Immigration Litigation (OIL) told the OIG that beginning in mid-October 2001 they discussed questions about the INS's legal authority to detain aliens who had been issued final orders of removal and voluntary departure cases at SIOC Working Group meetings.[70] Either the Senior Counsel to the DAG, a former INS attorney who coordinated immigration issues along with Levey in the Deputy Attorney General's office, or another counsel who transferred from OIL in November 2001 to the Deputy Attorney General's office and who worked with Levey on immigration matters generally, attended these daily SIOC meetings between September and December 2001.[71] Notes taken by OIL attorneys

[70] As described in Chapter 2, the SIOC Working Group was an interagency group formed to coordinate efforts among the various components within the Department of Justice who had an investigative interest in or responsibility for the September 11 detainees. In addition to the FBI, the Working Group included staff from the INS, the Department's Office of Immigration Litigation (OIL), the Terrorism and Violent Crime Section (TVCS) of the Department's Criminal Division, and the Office of the Deputy Attorney General.

[71] In response to the draft report, the Senior Counsel asserted that she often missed the SIOC meetings due to other assignments, and that she attended "very few" meetings after the additional counsel joined the office in November 2001. In response to the report, Levey also stated that he generally did not attend SIOC meetings with "a few exceptions at the beginning of the process." As noted in Chapter 4, however, Levey was in attendance at a SIOC meeting (cont'd)

during this period confirm that its representative in the SIOC Working Group raised concerns about the limits of the INS's detention authority as early as October 26, 2001.

In particular, one OIL attorney told the OIG he described at an October 26, 2001, SIOC Working Group meeting limits on the INS's legal authority to detain final order cases as a "problem." According to this attorney, he told participants at the meeting (including the Senior Counsel to the DAG), that the Government's obligations with respect to the 90-day removal requirement were "ambiguous." He described how the slow pace of the clearance process created a "high litigation risk" for the Department.[72]

By mid- to late-October 2001, an OIL attorney noted in an internal OIL document that 45 detainees on the INS Custody List already had final orders of removal or had been granted voluntary departure. INS and OIL staff working in the SIOC Working Group said that, at the time, they realized that the FBI clearance process was moving much slower than anticipated. The OIL attorney said he told Levey's staff that voluntary departure cases were even more problematic than final order cases in terms of the INS's legal authority to continue to detain the aliens.[73] He said he urged the FBI and INS to place all

on November 2, 2001, when the INS claims it raised concerns about the limits of its detention authority.

[72] Notes from the FBI OGC attorney assigned to the SIOC Working Group from that same date indicate that the 90-day issue was discussed in some detail at the meeting. According to these notes, an INS representative stated that there were "45 cases with final orders," dating to as far back as September 12. The notes also reflect that the INS representative stated that there is a 90-day removal period, and that there is a "split of opinion" as to whether the INS's authority is "unfettered" during the 90-day removal period. The notes contain a notation: "clearances for removal – habeas fear" and reflect a comment that there is "some" additional time past 90 days, but the INS would "have to be trying to remove" the aliens. The notes also indicate that voluntary departure cases were discussed.

[73] An alien can avoid an order of removal by agreeing to voluntarily depart the country. 8 U.S.C. § 1229(c). To be eligible for voluntary departure, the alien must show that he or she has a readiness, willingness, and financial ability to leave the United States at his or her own expense; that he or she has good moral character for the previous five years; and that a favorable exercise of discretion is warranted. Id. The INS is not obligated to accept an alien's offer to voluntarily depart. If the INS agrees to the voluntary departure and the Immigration Judge grants it, the removal proceedings are terminated and the alien agrees to leave the United States on a specific date, under specific terms and conditions. Voluntary departure has some advantages over removal, both for the alien and the INS. A person who departs voluntarily is not barred from returning for 10 years, as is a person who is ordered removed. The INS also saves the expense of litigation (which may prolong detention) and transportation costs. Aliens who accept voluntary departure may remain in custody pending departure or may be released, depending on the particular circumstances. If an alien fails to depart by the specified date, the voluntary departure order converts to a final order, which carries with it the 10-year bar to re-entry.

final order cases on a "high priority list." The attorney told the OIG that his office was nonetheless prepared to defend any *habeas corpus* petitions that might be brought by detainees challenging their continued detention, and he believed that OIL had legal arguments upon which to base its defense.[74]

Several OIL attorneys said they informed members of the SIOC Working Group that the delays in removing aliens with final orders were creating an "increased litigation risk," were "inviting *habeas* petitions," and were "a bad idea." Two OIL attorneys said they urged the Department to speed up the FBI clearance process in order to address the issue of removing detainees with final orders.

Thomas Hussey, the Director of OIL, told the OIG that in late September 2001, he also raised, at a meeting with representatives of the Criminal Division and the Deputy Attorney General's office, the issue of detainees with final orders who were ready and willing to leave the United States but had yet to be cleared by the FBI. We confirmed this based on an e-mail exchange that occurred on February 7, 2002, between Carpenter, the INS's Deputy General Counsel, and an OIL attorney in which Carpenter informed the OIL attorney of two *habeas* petitions filed by detainees held after voluntarily departure had been granted. According to the OIL attorney's response:

> Our and INS's SIOC representatives have repeatedly sought to move the growing number of aliens in the WTCP [World Trade Center/Pentagon] pool who have taken or are subject to final orders, and particularly those who are approaching 90 or more days out. Thom [Hussey] anticipated the problem in one of the earliest WTCP meetings in ODAG [Office of the Deputy Attorney General]. What tends to happen now is that *habeas* filings by such aliens move them to the immediate attention SIOC list, and final clearance then tends to happen before we have to file a merits response.

OIL attorneys told the OIG they also raised concerns about the extent of the INS's detention authority with respect to specific detainee cases. For example, on December 19, 2001, the OIL supervisor sent an e-mail to other OIL attorneys noting that the staff in the Deputy Attorney General's office he spoke with about a particular case agreed that a *habeas corpus* petition should move the detainee "to the head of the CIA line" for clearance. The e-mail also said that the Deputy Attorney General's staff agreed with his assessment that the

[74] For example, in the Zadvydas case, which involved aliens whose countries of origin would not accept them, the Supreme Court stated that the "presumptively reasonable" detention period was six months. The Court also stated in Zadvydas, "In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about the alien's removal from the United States." Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

INS's failure to release certain detainees raised potential liability issues for the INS. The e-mail stated that the counsel in the Deputy Attorney General's office had:

> returned my call to [the Senior Counsel in the DAG's office] on these two [aliens who had filed the petition] and the larger issue. She said the similarly situated number is 180 (correcting the 200 number I threw out), the CIA has cleared about 120 of them, and 2 weeks ago promised quick action on the remaining 60 (whatever quick means, but she agreed that a habe[as] moves the alien to the head of the CIA line, or should – but who communicates that to the CIA?). She indicated that they ([the Senior Counsel]) agree with our legal authority assessment and that Bivens etc is a prospect. . . . She knows nothing about any HQ-type order that might be imposing these holds, other than [the Senior Counsel]/Stewart [Levey]'s verbal directive to get the cases through the CIA checks where possible.

A review of other documents also tends to support the INS's contention that it raised legal concerns about the extent of its detention authority and that attorneys in the Deputy Attorney General's office were aware of these issues. For example, e-mails from INS attorneys stated that the issue was repeatedly raised in SIOC Working Group meetings, which were often attended by staff from the Deputy Attorney General's office. In addition, INS officials interviewed by the OIG stated that Levey and other members of the Deputy Attorney General's staff were aware during the fall of 2001 that continuing to hold detainees who had obtained a final removal order or voluntary departure order presented a potential legal problem for the INS.[75]

[75] The INS also asserted that the case of Zacarias Moussaoui brought to Levey's attention the INS position on the limits on its authority to detain aliens with final orders who could be removed to their country of origin. Carpenter, the INS Deputy General Counsel, explained to the OIG that, due to his entry into the United States through the Visa Waiver Program, Moussaoui was ordered removed pursuant to summary proceedings. On November 14, 2001, according to Carpenter, Levey suggested the possibility that Moussaoui be placed into "regular" removal proceedings (versus summary proceedings), in order to start the process of removal again, and increase the time he could be held on the immigration violation. The INS advised that the removal proceeding could not be started over, and that if the INS continued to hold him on the final order, it risked a potentially successful *habeas* petition. The INS cited this exchange as evidence that Levey was aware of the INS's view that final order cases had strict time limitations within which the INS was required to effectuate the removal.

By contrast, Levey stated that this was an example of how the process worked – that a problem was identified and then solved. He did not agree that the Moussaoui case brought to his attention the general problem of INS time limits on its authority to detain aliens with final orders. Levey noted that he had a meeting to discuss the Moussaoui case scheduled with the Criminal Division for November 13, the day before this conversation with the INS apparently took place. He acknowledged that the discussion likely was prompted by the realization that (cont'd)

Levey and his Senior Counsel disputed the assertion that they were made aware of the legal issue regarding the limits of the INS's detention authority.[76] They told the OIG that while they were aware that individual detainees had final removal orders in the fall of 2001, they did not know that this situation presented a legal issue for the INS until they received a draft letter from the FBI in late January 2002 (discussed below) which stated that the FBI would concur in a decision to release a detainee (even when the clearance investigation was not complete) if the INS had determined that it had no legal basis to justify continued detention.

The Senior Counsel told the OIG that she was aware that aliens were accepting orders of removal and voluntary departure. She noted that she contacted the FBI agent assigned to the SIOC Working Group on December 11, 2001 (90 days after the PENTTBOM arrests began). She stated that the FBI agent told her that the "kinks" in the CIA check had been worked out and that they were "now caught up."[77] The Senior Counsel and Levey also both noted that, on December 19, 2001, Victor Cerda, the INS Chief of Staff, stated in an e-mail that the Department should "sell on the fact that the process is working, people are not being detained indefinitely in secret locations, and once no link or negative info[rmation] is determined after careful investigation, they are being processed in the normal course, often resulting in bond being posted and their release."[78]

Moussaoui was nearing 90 days after his order of removal. But he stated that the case did not raise, in his mind, a concern about other detainees who might be nearing 90 days after their orders of removal because he believed Moussaoui was an unusual case given that he was already in post-order detention on September 11. Levey said he did not realize at the time that other detainees were, or would soon be, similarly situated. He also stated that the fact that the INS contacted him about this case would have reinforced his "reasonable expectation" that the INS would bring other cases to his attention if they were "approaching a legal deadline."

[76] Levey wrote in his response to the draft report that, in his opinion, what the INS had failed to bring to his attention was its belief that it was "acting beyond its legal authority."

[77] The Senior Counsel said that she was not aware of substantial delays in the FBI's analysis of that CIA information, which had to be completed before detainees could be cleared. She also was not aware that the Special Agent whom she contacted was responsible for sending the name trace requests to the CIA and for forwarding the CIA responses to the FBI analysts. However, he was not responsible for the completion of the analysis of the CIA responses. See Chapter 4.

[78] Both the Senior Counsel and Levey point to this e-mail as evidence that the INS was satisfied with the clearance process and that it did not raise legal concerns to the INS. However, Cerda's e-mail was a suggested addition to a Public Affairs officer's proposed language to accompany a public release of updated INS detainee figures. According to Cerda, he clearly and emphatically expressed his concerns about the limits of the INS's detention authority to members of the Deputy Attorney General's office throughout the fall of 2001.

Prior to learning of the legal problem identified in the FBI's letters, Levey claimed he saw the area as presenting more of a "procedural" problem. He said he heard the INS's concerns more as complaints about the slowness of the clearance process than legal concerns, so he said he addressed the concerns by working to improve the clearance process. He described himself as an "advocate" for the INS in that regard. While he acknowledged that the INS may have mentioned the "litigation risks" presented by the detentions, he said that a warning such as that would not have been an effective means of informing him that the INS thought it was either in violation of the law or would soon be acting in violation of the law.

Levey told the OIG that the issue was not raised to him as a "legal" problem, as opposed to a procedural issue, until the DAG's Senior Counsel did so in January 2002. Levey explained in his response to the draft of this report that he assumed that the INS could hold an alien for 90 days after a final removal order. He told the OIG that he did not know that the INS believed that, in certain circumstances, it had less than 90 days. He said that once it was raised, he immediately did what he was told the law required – allow the INS to remove detainees whose 90-day removal period had expired. He said that before then he did not understand that the INS believed it was acting beyond its legal authority. Both Levey and the Senior Counsel stated that, up until that point in time, they had never asked themselves the question "as a matter of law, how long can we hold these aliens with final orders of removal or voluntary departure orders?"[79]

III. DETAINEES' LAWSUITS

Between October and December 2001, several September 11 detainees with final orders of removal and voluntary departure orders had filed lawsuits, or threatened to file lawsuits, to challenge their continued detention. The following are examples of cases in which detainees challenged their continued confinement:

- Two September 11 detainees filed a lawsuit against the Department in the Northern District of Ohio on December 18, 2001, when the INS did not allow them to leave the country after they had received voluntary departure orders from an Immigration Judge. Two weeks prior to filing the petition for release, the detainee's attorney wrote the INS asking, among other things, "[u]nder what specific legal authority does the INS and/or the Department of Justice propose to prohibit these young men from returning home?" The INS did not

[79] Levey asserted that he had no reason to ask himself this question because he said he was not informed until January 2002 that aliens were being detained for more than 90 days.

respond to the attorney's questions. The attorney filed the December 18, 2001, *habeas corpus* petition asserting that it was unlawful for the United States to prohibit the detainees from leaving the country. The next day, the detainees received final clearances from the FBI and were permitted to leave the country.

- A September 11 detainee who received a voluntary departure order from an Immigration Court had until November 23, 2001, to leave the country. However, that date passed with the INS refusing to release the detainee because FBI Headquarters had not issued a clearance letter because it had not received the CIA checks. Consequently, the INS District Director extended the time for the detainee's voluntary departure past November 23, 2001, to prevent the voluntary departure order from converting to a removal order (which would result in more restrictive consequences to the detainee).

 The detainee's attorney filed a *habeas corpus* petition seeking his release on November 27, 2001. An e-mail from an INS Bond Unit attorney to an official at INS Headquarters noted that while the INS attorney handling the case in the district had made the "eminently reasonable" assumption that the detainee "must be a serious criminal or terrorist," that assumption was not correct. The Bond Unit attorney explained that "the only reason [the detainee] remains on the list is for the CIA to run checks. It had been in that posture for at least two weeks." He wrote that "there is no evidence [the detainee] is a terrorist or is of interest to the FBI." In an earlier communication, the attorney had stated "how should the Service [INS] proceed. Should the Service continue to hold an individual for whom there is a final order, is on hunger strike, and for whom the FBI has no interest, in order for an administrative function to be completed, when that function is for reasons unknown to me, taking in excess of two weeks?"

 The acting director of the National Security Law Division forwarded the Bond Unit attorney's comments to Cooper, the INS General Counsel, and noted that this detainee's case was discussed regularly by the SIOC Working Group. Another INS attorney noted in an e-mail to a Regional Counsel that the alien's attorney had "threatened to go public and tell the Islamic community not to cooperate with the government . . . because the only thing that will happen is that they would be locked up indefinitely. The timing of this is horrible, coming as it does in the middle of the Attorney General's effort to interview all those other

folks."[80] The alien was removed from the United States on December 4, 2001.

These examples indicate that the INS generally avoided addressing the substantive legal issues raised in the *habeas corpus* lawsuits by obtaining FBI Headquarters's clearance for an individual detainee who had filed a legal action before a formal response was needed on the merits. The INS first would argue that the detainees failed to exhaust all administrative remedies, thereby avoiding the primary legal question of whether the Department had legal authority to continue holding these detainees until the FBI could complete its clearance investigations. However, other aliens in similar circumstances, who did not have attorneys or had attorneys who did not file *habeas* petitions, remained in custody.

Witnesses from the FBI, the INS, the Criminal Division, and OIL stated that the *habeas* cases were a top priority for the Department, and that members of the Deputy Attorney General's office were aware of the issues in these cases, including the legal claims brought by the aliens challenging the INS's authority to detain them. Staff members for the Deputy Attorney General's office dispute this. For example, the Senior Counsel in the DAG's office told the OIG that she does not recall being aware of the details of the *habeas* petitions, nor does she recall any of the petitions raising the 90-day issue.

IV. POLICY CHANGE ALLOWING DETAINEES TO BE REMOVED WITHOUT FBI CLEARANCE

In January 2002, the Department changed its position as to whether the INS should hold aliens after they had received final orders of removal or voluntary departure orders until the FBI had completed the clearance process.

On January 18, 2002, an attorney working in the INS Commissioner's office requested a meeting with the Deputy Attorney General's Senior Counsel to discuss how to handle the final order cases that had not been cleared by the FBI.[81] Five days later, on January 23, 2002, the INS faxed a list containing 54 detainees who had been held more than 90 days after receiving final removal or voluntary departure orders. INS officials provided a copy of this list to all SIOC Working Group members, including OIL, the FBI, and the Senior Counsel from

[80] This apparently refers to the FBI's plan to conduct voluntary interviews of 5,000 foreign visitors.

[81] The Senior Counsel told the OIG that the request did not contain any words that conveyed a sense of urgency. According to her, the e-mail seemed to be innocuous.

the Deputy Attorney General's office, and the Working Group discussed these cases at a meeting the next day.[82]

At the same time, the INS General Counsel's Office completed a legal opinion regarding its interpretation of the limits of its authority to detain aliens with final orders of removal within the 90-day removal period. The INS had been working on this opinion since October 2001. The legal opinion, formatted as a memorandum, was addressed to Pearson, the INS Executive Associate Commissioner for Field Operations. Carpenter, the INS Deputy General Counsel, and Cerda, the INS Chief of Staff, told the OIG that the opinion was faxed to Levey's office on the day it was issued, January 28, 2002. However, Levey and his counsels stated they did not see the opinion until many months later.

The INS written opinion concluded that the INS has a duty to remove an alien with "reasonable dispatch" and the removal could not be delayed for the exclusive purpose of allowing the FBI to conduct an investigation to see if the person is a terrorist. The "Summary Conclusion" of the opinion stated:

> The INS has the authority to detain an alien with a final order of removal during the 90-day removal period as long as the INS is acting with reasonable dispatch to arrange the removal of the alien from the United States. This authority may be called into question if the INS cannot establish that it diligently pursued the steps necessary to remove the alien. Section 241(a)(2) of the Immigration and Nationality Act (INA) states that the INS had the authority to detain an alien with a final order of removal for up to 90 days, the length of the removal period. However, case law provides that detention must be related to removal and cannot be solely for the purpose of pursuing criminal prosecution. While there is no bar to the government's continuing a criminal investigation during the removal period for possible prosecution of the alien, the INS must also be proceeding with reasonable dispatch to arrange for removal and the investigation for criminal prosecution cannot be the primary or exclusive purpose of detention.

[82] The Senior Counsel to the DAG told the OIG that legal concerns about the limits of the INS's detention authority with respect to final order and voluntary departure cases were not raised at this meeting. OIG interviews with the FBI OGC's representative at the SIOC Working Group suggest that the INS's concerns were being conveyed at the SIOC meetings to members of the Working Group, including the Deputy Attorney General's Counsel, with some urgency during this time frame. According to the FBI OGC representative, her increasing "discomfort" with respect to the final order issue caused her to brief the FBI General Counsel in December 2001, and caused her to draft the letter from FBI Director Mueller to the INS on January 28, 2002, discussed in detail later in this chapter.

At the same time the INS was drafting this legal opinion, FBI officials were growing concerned as more and more September 11 detainees passed the 90-day mark after receiving final removal orders without being cleared. After reviewing the Supreme Court decision that addressed limits on the detention of aliens who could not be returned to their country of origin in the "foreseeable future," [83] the FBI attorney representative to the SIOC Working Group said she was concerned that the September 11 detainees were being held longer than permitted under the law. She said she also became increasingly troubled by the fact that the INS was looking to the FBI as the agency responsible for extending the length of the detainees' confinement and the fact that the INS was not seeking travel documents until clearance letters were received from the FBI. She was also concerned about the upcoming INS custody review process. She said that the slow pace of the FBI clearance process was due to an FBI "staffing issue." However, she said the INS had not told the FBI "you have to let them [the detainees] go," and she believed that the INS had allowed the situation to get to the point where dozens of detainees had been held beyond their initial removal periods or voluntary departure dates.

The FBI attorney also told the OIG that in December 2001 she briefed FBI General Counsel Larry Parkinson that detainees were filing *habeas corpus* petitions to protest their confinement and that she thought there was very little upon which to defend the case for continuing to detain the aliens. She told Parkinson that her efforts to "prioritize" detainees so that those with final orders would receive FBI clearances within the 90-day period had been unsuccessful. Parkinson subsequently briefed FBI Director Mueller on the problem. When interviewed by the OIG, Director Mueller could not recall this particular briefing, but did not dispute that it occurred.

As several more weeks went by and the issue remained unresolved, with Parkinson's approval, the FBI attorney sought to clarify the FBI's position with respect to detainees with final removal orders. She therefore drafted a proposed letter for FBI Director Mueller to send to INS Commissioner Ziglar that stated, "If the INS has determined that there is no legal basis justifying continued detainment of that alien, the FBI concurs with the INS's determination to permit the individual to be removed." Previously, the FBI's position, and that of the Department, was that the INS should wait for results of the FBI clearance investigation before releasing or deporting any September 11 detainee. On January 28, 2002, the same day the INS states that it circulated its legal opinion about holding the detainees during the 90-day removal period, the attorney circulated her draft letter to her supervisor and the FBI General Counsel, as well as to the counsel to the DAG. At a subsequent meeting that, according to the FBI attorney, was attended by the

[83] Zadvydas v. Davis, 533 U.S. 678 (2001).

Senior Counsel to the DAG, INS Chief of Staff Cerda, and an INS NSLD attorney, the letter was discussed and a decision was made that it would not be formalized and sent by the FBI to the INS.[84]

The additional counsel to the DAG, who worked on immigration matters along with the Senior Counsel to the DAG, stated that the issue of limits on the INS's detention authority was raised at a January 28, 2002, SIOC Working Group meeting she attended. She said she told the FBI attorney that the law was unclear, but to be on the "safe side" the INS should proceed with removal as soon as possible. Her notes appear to indicate that the FBI, the Terrorism and Violent Crime Section, and the Deputy Attorney General's office made an initial decision at this meeting to permit the INS to release detainees with final orders of removal who had not received FBI clearance.

The Senior Counsel told the OIG that when she read the FBI's draft letter it was the first time she became aware that the INS faced a legal issue involving how long it could detain an alien who had a final order of removal. She told the OIG that she then raised the issue with Levey immediately. She said she and Levey discussed the possibility of allowing aliens with final orders to be removed without FBI clearance with officials from the INS, FBI, and Criminal Division. This discussion, according to the Senior Counsel, was prompted by the indication in the FBI letter that detaining aliens after they had received final orders was unlawful.[85]

Levey said he agreed to revise the Department's policy to allow the INS to remove aliens with final orders without FBI clearance. Levey told the OIG that he could not recall whether he consulted with any higher-level officials in the Deputy Attorney General's office or the Attorney General's office before deciding to change what had been Department policy for almost five months. The Senior Counsel's notes indicate that Levey stated on January 29, 2002, "The

[84] After reviewing a draft of this report, the Senior Counsel told the OIG that she does not recall such a meeting and does not believe such a meeting took place.

[85] In response to a draft of our report, the Senior Counsel said that when the other counsel to the DAG obtained a copy of the letter from an INS attorney, they and Levey immediately called Cerda. She said that during that call, Cerda did not mention the January 28, 2002, INS opinion regarding the limits on the INS's authority to detain aliens with final orders of removal within the 90-day removal period. The Senior Counsel stated that she did not see a copy of the INS opinion until October 2002. She told the OIG that if she had been informed that the INS was working on such an opinion, her office would have convened a meeting of representatives from INS, OIL, the Office of Legal Counsel (OLC), and the Office of the Solicitor General to discuss the legal issues and advise the Department on the correct interpretation of the law. She told the OIG that when her office requested an opinion on the issue from OLC in the fall of 2002 with respect to a particular case, her office received oral advice "within a few weeks" that the detention in question was legal. OLC's February 2003 opinion is discussed in more detail later in this chapter.

law is the law, change the policy."[86] Levey also stated that he verified that the Criminal Division and the FBI did not oppose this change.

The Attorney General told the OIG that he was unaware of people being detained inordinately long after a deportation order. He also stated that he had no recollection of the INS telling him of any concern that aliens were being detained against the law.

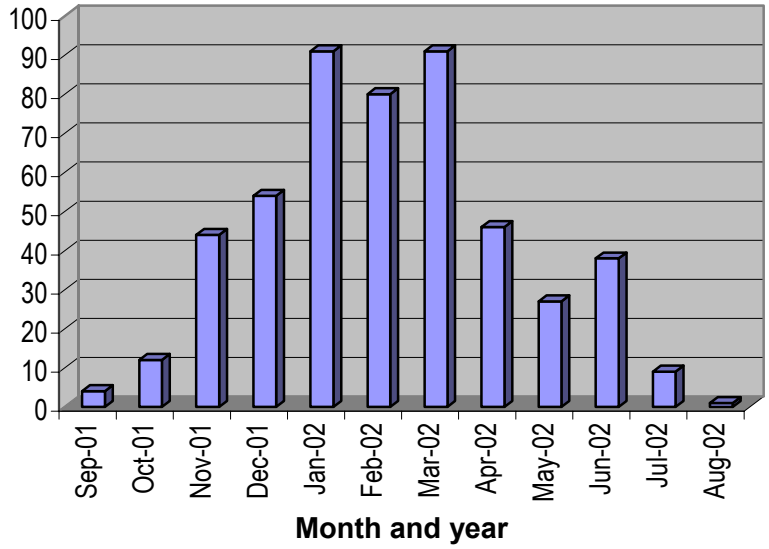
The Senior Counsel distributed new procedures to the INS, FBI, OIL, and Criminal Division in an e-mail on February 6, 2002. According to her e-mail, the INS was instructed to fax to the FBI and Criminal Division at the end of each day information on the day's hearings and the results of each hearing. The INS then would be able to proceed with removal of aliens with final orders without giving the FBI or Criminal Division any additional notice. If the FBI or Criminal Division had a particular interest in a case, they were to contact the INS about it. The INS would prioritize the cases with final orders over 90 days to allow those aliens to be removed. The FBI continued the clearance process, but the INS did not have to wait for a clearance letter in order to remove a detainee who was otherwise ready to go.

Many of the September 11 detainees with final orders were not removed immediately because the INS had not yet requested travel documents for them. Because travel documents are only valid for a limited period, the INS had not requested documents in advance since they might expire before the FBI clearance had arrived. After the policy change, in early February 2002 the INS requested travel documents for detainees whose removals had been held up due only to their lack of FBI clearance. By August 2002, the majority of the aliens on the INS Custody List either had been released or removed.

The following charts show the timing of when September 11 detainees were removed and the number of days from their arrest to their removal or release.

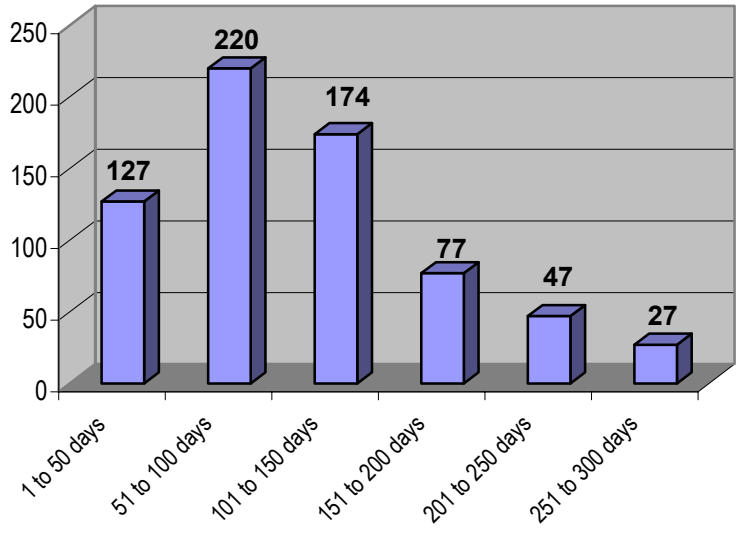
[86] The Senior Counsel and Levey point to this notation from January 29, 2002, as evidence that they had been unaware of the legal issue prior to that date, and that they took quick action once the FBI letter raised it to their attention.

Figure 8
Detainees Removed per Month



Note: 197 of the 762 detainees were released on bond, leaving 565 detainees. Of the 565, 68 had no release or removal dates. Consequently, the data in the chart represents 497 detainees not released on bond.

Figure 9
Number of Days from Arrest Date to Removed/Released Date



*Number of missing values = 90

V. OLC OPINION

In the fall of 2002, the Deputy Attorney General's office asked the Office of Legal Counsel (OLC) to address two legal questions concerning the timing of removal of a detainee subject to a final order of removal under section 241(a) of the Immigration and Nationality Act (INA):

1) Whether the Department is under an obligation to act with reasonable dispatch in effecting an alien's removal within the 90-day removal period established by the INA; and

2) Whether and for what purposes the Department may refrain from removing the alien beyond the 90-day period.

The OLC conducted its analysis in the context of an alien who had received a removal order in October 2002 and whose 90-day removal period expired in December 2002 without his being removed. The OLC opinion stated that insufficient information existed at first to press criminal charges or to transfer the detained alien to military custody as an enemy combatant. The OLC opinion stated that the question presented was whether the alien's removal could be delayed to continue the investigation concerning his al Qaeda connections.

The OLC issued its memorandum opinion on February 20, 2003. The opinion concluded that, contrary to the opinion of the INS General Counsel, the INA by its terms grants the Department the full 90 days to effect an alien's removal and imposed no duty to act within any particular speed within the 90-day period. The OLC opinion stated, however, that the Department's ability to remove an alien within the 90-day period is not entirely unconstrained and "must be supported by purposes related to the proper implementation of immigration laws." The OLC stated that although its opinion did not have to provide a comprehensive assessment of what purposes were "related to the proper implementation of immigration laws," it concluded that investigating whether an alien has terrorist or criminal connections was related to the proper implementation of immigration laws.

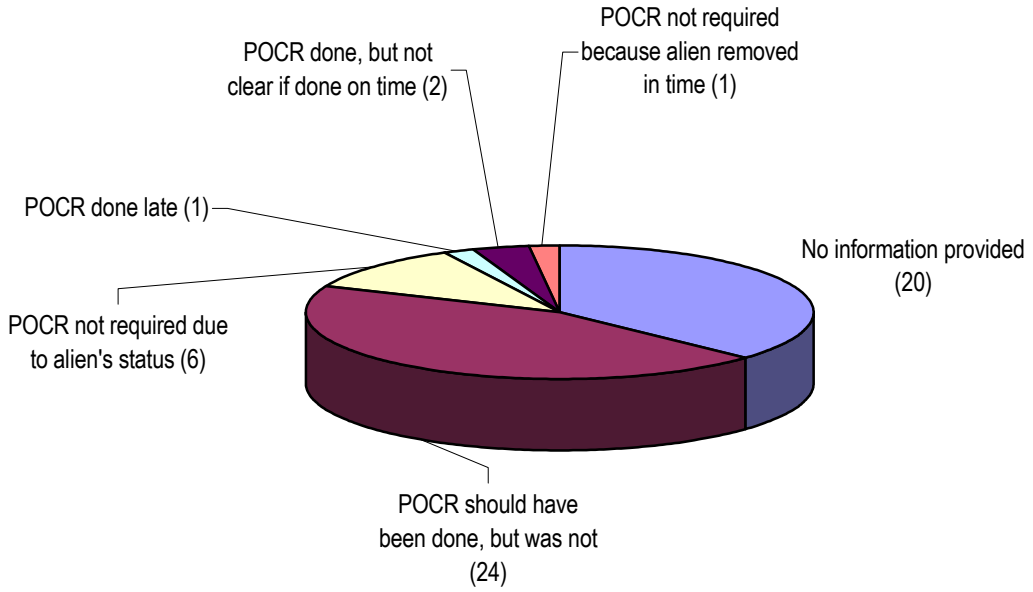
The OLC opinion also concluded that it was permissible for the Department to take more than 90 days to remove an alien, even when the alien could be removed within 90 days, if the delay was related to affecting the immigration laws and the nation's immigration policies. Again, the opinion did not describe all the circumstances that would meet this test, but it concluded that investigating whether an alien has terrorist connections met the test.

VI. POST-ORDER CUSTODY REVIEWS OF SEPTEMBER 11 DETAINEES

We found that the September 11 detainees who were held by the INS beyond 90 days after their final orders of removal did not receive a Post-Order Custody Review (POCR) as required by regulation. According to 8 C.F.R. § 241(4(h)(5), aliens held for 90 days after a final order of removal are, by INS regulation, entitled to custody reviews to determine if their continued custody is warranted. Several witnesses told the OIG that these POCRs were not conducted for September 11 detainees.

To examine this issue, we requested information on POCRs for the 54 detainees on the January 23, 2002, list prepared by the INS of aliens with final orders who had been held more than 90 days. We found that, for the most part, the INS failed to conduct POCRs for these September 11 detainees as required by the regulations. For 20 of the 54 cases in this sample, the INS was unable to provide any information related to POCRs. For another 24 detainees in the sample, the INS data shows that POCRs should have been completed but were not. For six additional detainees, the INS noted that POCRs were not required because the aliens had obtained voluntary departure orders. The INS said it removed one additional alien before his POCR was due, it completed one POCR two weeks late, and it completed two reviews without documenting whether the INS was within the deadline imposed by the regulation.

Figure 10
Information Regarding Post-Order Custody Reviews



When we asked the INS to explain the lapses in conducting POCRs for September 11 detainees, a Special Counsel in the INS OGC cited several reasons. First, he said because the INS was unable to remove detainees on the INS Custody List until they were cleared by the FBI, INS District officers may have believed there was no purpose in performing the custody reviews. In addition, he said a number of aliens moved in and out of INS custody at different points in time and this probably led to confusion. Finally, he cited problems caused by the tremendous workload on INS staff in the New York and Newark Districts stemming from the PENTTBOM investigation.

VII. OIG ANALYSIS

In the aftermath of the September 11 attacks, whether the INS legally could hold September 11 detainees after they had received final orders of removal or voluntary departure orders to conduct FBI clearance investigations was the subject of differing opinions. A February 2003 OLC opinion concludes, however, that the INS can do so if the delay is related to the proper implementation of immigration laws, including investigating whether the alien has terrorist or criminal connections. A pending lawsuit also is addressing this issue.

Regardless of the outcome of that lawsuit, our review found that the INS and the Department did not address this issue in a timely or considered fashion. For many months, detainees were being held, even beyond 90 days, despite their willingness to leave the country. Some INS attorneys had doubts about the legality of preventing the September 11 detainees from leaving the country not only after 90 days had passed, but even within the 90-day removal period if the alien was willing to leave and arrangements could be made to remove the alien. INS and OIL attorneys asserted that they raised their concerns about the limits of the Government's detention authority at various meetings, and we found evidence that they did. Yet, despite their concerns about the issue, as time passed and the issue was not addressed, the INS did not raise these concerns at a higher level. On such an important issue, considering the significant doubts that these attorneys harbored about the legality of the policy, we believe the INS had a responsibility to press the issue clearly – and in writing – if it believed that the policy presented a legal issue for the Department. It did not do so until January 2002, almost five months after the issue first arose.

By the same token, we concluded that attorneys in the Deputy Attorney General's office who were responsible for coordinating these immigration issues had enough information to realize that this was a significant legal issue that needed to be addressed. The evidence indicates that Associate Deputy Attorney General Levey and his counsels attended meetings at the SIOC Working Group when the legal concerns regarding the extent of the INS's authority to detain

aliens with final orders of removal were raised. While they stated they did not know that the final order and voluntary departure cases presented a legal problem (as opposed to a procedural problem) until late January 2002, we concluded that there was sufficient discussion and information about this issue that they should have considered earlier the limits on the Government's authority to hold detainees with final removal orders, both within the 90-day period and after the 90-day period.[87] These issues also were raised by *habeas corpus* petitions and questions posed in the media and by Congress to Department officials. We believe the Department's senior officials with day-to-day responsibility for immigration issues should not have missed the fact that continued detention of aliens who had final orders presented an important legal issue. Further, we believe the Department should have squarely addressed this issue, well before the end of January 2002 when the policy was changed.

In response to the draft of this report, Deputy Attorney General Thompson stated that it is important to take account of the circumstances and atmosphere in the Department during this time period. He wrote that the period after the September 11 attacks was one of tremendous intensity, as the Department was required to alter its central mission to prevent further acts of terrorism. He noted that his staff was required to respond, in a crisis atmosphere, to hundreds of novel issues; had to shoulder a monumental task and an enormous workload; and had a great number of other responsibilities during this period as part of a comprehensive effort to protect the United States from further acts of terrorism. He wrote:

> The detention of those illegal aliens suspected of involvement with terrorism was paramount to that mission. My staff understood that the immigration authorities of the Department should be used to keep such people in custody until we could satisfy ourselves - by the FBI clearance process - that they did not mean to do us harm.
>
> Given those circumstances, I respectfully submit that it is unfair to criticize the conduct of members of my staff during this period. In light of the imperative placed on these detentions by the Department, I would not have expected them to reconsider the detention policy in the absence of a clear warning that the law was being violated. It is clear in the Draft Report that that did not occur until January 2002. When the issue was squarely presented, it is apparent that they promptly did the right thing: they changed the policy.

[87] After reviewing a draft of this report, Levey clarified that he was not aware until late January 2002 that the INS "believed it was acting unlawfully." He acknowledged that the INS had raised concerns about detaining the aliens, but asserted that INS officials did not do so in a "coherent or appropriate" way that communicated their concerns about these final order cases with any "transparency or urgency."

[The full text of his letter is included at Appendix K.]

We recognize the circumstances surrounding the response to the September 11 attacks. We agree that there were enormous demands on the Deputy Attorney General's staff – and on the entire Department – after the September 11 attacks, as the Department reoriented its mission and acted to prevent further attacks of terrorism. Yet, we believe that the Department, particularly staff in the Deputy Attorney General's office who were responsible for coordinating immigration issues, should have carefully considered before January 2002 such a critical issue as the extent of the Department's authority to hold detainees who had been issued final orders of removal, both up to and beyond the 90-day removal period. As we have pointed out above, we also agree that the INS could have, and should have, raised these issue more clearly and in writing before January 2002.

But the evidence indicates that concerns about the extent of the INS's detention authority were, in fact, raised by the INS and OIL attorneys before January 2002. We also conclude that the attorneys on the Deputy Attorney General's staff who were responsible for coordinating immigration issues should have been on notice of these issues not only because of the concerns expressed by INS and OIL attorneys at various meetings, but also because of the issues raised by the Moussaoui case, the *habeas corpus* petitions, and questions that were being raised publicly by Congress and the press. The authority of the Department to hold detainees after they received final orders of removal was not a hidden issue. We believe that, notwithstanding their significant responsibilities and the circumstances and atmosphere of the time, the Department attorneys responsible for coordinating immigration issues should have addressed squarely and earlier the issue of the Department's authority to hold detainees up to and beyond 90 days from when they received final orders of removal.

Finally, with respect to the custody reviews, the regulations clearly require the reviews and the INS should have conducted them in a timely manner.

CHAPTER SEVEN

CONDITIONS OF CONFINEMENT AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK

I. INTRODUCTION

Almost 60 percent of the 762 aliens detained in connection with the Government's investigation of the September 11 terrorist attacks were arrested in the New York City area. As discussed previously, the overwhelming majority of these aliens were arrested on immigration charges that, in a time and place other than New York City post-September 11, would have resulted in either no confinement at all or confinement in an INS or INS contract facility pending an immigration hearing. However, fear of additional terrorist attacks in New York City and around the country changed the way aliens detained in connection with the investigation of the September 11 attacks were treated.

Aliens arrested by the INS on immigration charges who were deemed by the FBI to be of "high interest" to its terrorism investigation were held in high-security federal prisons across the country, such as the Federal Bureau of Prisons's (BOP) Metropolitan Detention Center (MDC) in Brooklyn, New York.[88] Overall, the BOP confined 184 September 11 detainees in its facilities nationwide. A total of 84 detainees determined by the FBI to have a possible connection with the PENTTBOM investigation or terrorism in general were housed at the MDC from September 14, 2001, to August 27, 2002.

Generally, aliens deemed by the FBI to be "of interest" or "of undetermined interest" to the Government's terrorism investigation were detained in lower security facilities, such as the Passaic County Jail in Paterson, New Jersey (Passaic). From September 2001 to May 2002, 400 September 11 detainees were confined in Passaic.

This chapter examines the conditions of confinement for September 11 detainees held at the MDC, while the next chapter examines conditions experienced by September 11 detainees at Passaic. As we discuss in these two chapters, the FBI's initial assessment of its level of interest in specific September 11 detainees directly affected the detainees' conditions of confinement within the institution and their access to telephones, legal counsel, and their families.

[88] The MDC is a 9-story BOP facility in Brooklyn that generally houses men and women either convicted of criminal offenses or awaiting trial or sentencing. On December 10, 2002, the MDC housed 2,441 men and 181 women.

In this chapter, we discuss the BOP's initial communications blackout after the terrorist attacks; its classification of September 11 detainees as "witness security" inmates; the MDC's administrative maximum (ADMAX) Special Housing Unit (SHU), a special high-security section of the facility where September 11 detainees were held until cleared by the FBI of involvement with terrorism; the MDC's process for transferring September 11 detainees from the ADMAX SHU to the facility's general population; the detainees' access to legal counsel; allegations of physical and verbal abuse made by detainees against MDC staff; and other condition of confinement issues, including consular visits, recreation opportunities, medical care, and lighting conditions in the ADMAX SHU cells.

II. INITIAL COMMUNICATIONS BLACKOUT AFTER SEPTEMBER 11

Immediately after the September 11 attacks, the BOP ordered all detainees who were "convicted of, charged with, associated with, or in any way linked to terrorist activities" to be placed in the highest level of restrictive detention. Also, MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment. BOP Director Kathy Hawk Sawyer told the OIG that this designation resulted from the FBI's assessment and was not the BOP's "call." Detainees held in the MDC's ADMAX SHU were subjected to the most restrictive conditions of confinement authorized by BOP policy, including "lockdown" for 23 hours a day, restrictive escort procedures for all movement outside of the ADMAX SHU cells, and tight limits on the frequency and duration of legal telephone calls.

Hawk Sawyer told the OIG that the detainees were held under these restrictive detention conditions, in part because the BOP did not know who the detainees were or what security risks they might present to BOP staff and facilities. She said the policies applied to the September 11 detainees were not new policies created specially for the detainees. Rather, the policies were long-standing BOP practices for housing inmates who presented special security concerns. She noted that on any given day persons are detained by the BOP in conditions exactly like those applied to the September 11 detainees.

Hawk Sawyer informed the OIG that the Department did not initially give the BOP any guidance on how to confine the detainees. However, she said the Deputy Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christopher Wray, called her during the weeks after September 11 with concerns about detainees' ability to communicate both with those outside the facility and with other inmates. Hawk Sawyer said she discussed specific September 11 detainees during these conversations as well as the detainees in general. Hawk Sawyer stated that Laufman's and Wray's concerns about the detainees' ability to communicate both with those outside the facility and with other inmates confirmed for her that the BOP's initial decision to restrict detainee communications with

persons outside the facility and to isolate them from the general inmate population and from each other was appropriate.

Hawk Sawyer also told the OIG that she had conversations with David Laufman and Christopher Wray from the Office of the Deputy Attorney General, in which she was told to "not be in a hurry" to provide the September 11 detainees with access to communications – including legal and social calls or visits – as long as the BOP remained within the reasonable bounds of its lawful discretion. Hawk Sawyer emphasized that Department officials never instructed her to violate BOP policies, but rather to take the policies to their legal limit in order to give officials investigating the detainees time to "do their job."

Laufman, Chief of Staff to the Deputy Attorney General, confirmed the substance of the conversations described by Hawk Sawyer. He told the OIG that he urged the BOP to exercise the full scope of its discretion to sequence detainee outside contacts on the "back end" of the BOP's discretion. Wray stated that when he contacted Hawk Sawyer about some specific criminal inmates connected to terrorism who were already in BOP custody at the time of the September 11 attacks, he discussed having these inmates placed under the most secure conditions possible. He stated that while he does not recall giving any specific instructions, he stated that the "spirit" of his comments was that the BOP should, within the bounds of the law, push as far toward security as they could.

On September 12, 2001, David Rardin, the BOP's Northeast Region Director (which includes the MDC), directed wardens in his region not to release inmates classified by the BOP as "terrorist related" from restrictive detention in SHUs "until further notice." Rardin also ordered a communications blackout for September 11 detainees during a telephone conference call with all Northeast Region Wardens on September 17, 2001. Consequently, MDC staff did not allow detainees to receive telephone calls, visitors, or mail, or to place telephone calls or send mail until the BOP received information concerning the security risks presented by the detainees.

We could not determine with any certainty the length of the communications blackout that affected September 11 detainees in BOP facilities. However, based on multiple witness interviews, the blackout appears to have lasted from several days to several weeks. According to Michael Cooksey, the BOP Assistant Director for Correctional Programs, all September 11 detainees initially were held incommunicado, but after 8 to 10 days detainees were permitted limited attorney and social contacts. John Vanyur, Senior Deputy Assistant Director in the BOP's Correctional Programs Division, told the OIG that the detainees had no external contacts for the first few weeks after the terrorist attacks until the BOP received more information on the September 11 detainees being held in BOP facilities.

Fifteen of the September 11 detainees we interviewed who were placed in the MDC between September 14 and October 16, 2001, told the OIG that this "communications blackout" continued until mid-October 2001.[89] The detainees said that during this period, MDC staff did not permit them visitors, legal or social telephone calls, or mail.

The BOP, in comments submitted to the OIG after reviewing the draft of this report, stated that "at no time did the [BOP] prohibit detainees from sending outgoing mail" that would have informed detainee attorneys and family members where they were being held. Our interviews with MDC staff and September 11 detainees and BOP documents contradict this assertion. For example, a conference call between the Eastern Regional Director on September 20, 2001, and various wardens (including MDC Warden Zenk) re-established legal visits, legal telephone calls, and legal mail for the September 11 detainees. However, detainees continued to be denied social visits, non-legal telephone calls, and non-legal mail until approximately mid-October 2001.

By the same token, the detainees' recollections that the communications blackout lasted until mid-October 2001 conflicted with MDC records showing detainees meeting with some consular officials and attorneys in early October 2001. On October 1, 2001, Cooksey issued procedures to all BOP facilities housing September 11 detainees that should have ended the communications blackout that had been imposed on the detainees.[90] This memorandum permitted "legal mail, legal calls, and legal visits for September 11 detainees in accordance with written Bureau (BOP) policy." Yet, even though this communications blackout was supposed to be lifted by Cooksey's October 1 memorandum, the way the BOP classified September 11 detainees created significant restrictions on access to detainees, which we describe below.

[89] Because the September 11 detainees did not have calendars or clocks in their ADMAX SHU cells, during their interviews with the OIG most of the detainees estimated dates when specific events occurred.

[90] "Guidance for Handling of Terrorist Inmates and Recent Detainees," October 1, 2001, memorandum from Michael B. Cooksey, Assistant Director, Correctional Programs Division, BOP.

III. IMPACT OF DETAINEE CLASSIFICATION

A. Detainees' Classification

The BOP initially classified all September 11 detainees it housed as Witness Security, or WITSEC, inmates.[91] Witness Security inmates generally are individuals who agree to cooperate with law enforcement, judicial, or correctional authorities by providing evidence against persons or groups involved in illegal activities. Because their cooperation with the Government can place their lives in jeopardy, the BOP takes significant precautions to ensure the safety of WITSEC inmates. Accordingly, any information about WITSEC inmates is closely guarded, such as their identity, location, and status.

Normally, the arresting agency would inform the BOP of the person's status and the need for WITSEC protection, but the BOP classified the detainees in this category without any individual assessment of the circumstances of their arrests.

When applied to the September 11 detainees, the WITSEC classification resulted in MDC officials withholding information about the detainees' status and location. This made it very difficult for attorneys, family members, and, at times, law enforcement officers to visit September 11 detainees or even determine their location. For example, because information on WITSEC inmates is so strictly protected, staff who worked at the MDC's reception desk did not know specific detainees were confined at the MDC and often told people inquiring about a September 11 detainee that the detainee was not being held at MDC when, in fact, he was. The MDC reception staff instead would refer the caller or visitor to the BOP's National Locator systems for information about the detainee.[92] Yet, because WITSEC inmates are not listed in the BOP's National

[91] See September 21, 2001, memorandum from Cooksey to BOP Regional Directors and Wardens categorizing September 11 detainees as "General Population WITSEC" in the BOP's SENTRY system. SENTRY is the BOP's database for monitoring the movement and management of all BOP inmates. BOP management was uncertain about the potential security risks posed to BOP staff and to other BOP inmates by the September 11 detainees. They believed that they needed to provide a greater measure of security for the September 11 detainees. The WITSEC categorization, with its accompanying additional security provisions, provided BOP management with a quick, "off-the-shelf" methodology to address their security concerns.

[92] Members of the public have access to at least two resources to obtain information about inmates – including September 11 detainees – in the BOP's custody. The first resource, the Inmate Locator on the BOP's website (www.bop.gov), allows people to search the BOP database using a variety of criteria, including the inmate's name and BOP or INS number. When a match is made, the Inmate Locator provides the following information: the inmate's name; BOP Register Number; age; race; sex; projected release date; date released; and the name of the BOP facility holding the inmate. The information, which comes from the BOP's (cont'd)

Locator systems, people who accessed the registry to inquire about September 11 detainees were unable to obtain any information about where a particular detainee was being held.

The OIG interviewed four attorneys who each represented a September 11 detainee housed at the MDC about their initial efforts to contact their clients. Three of the attorneys told us that they were informed by MDC front desk staff at some point that their clients were not present at the MDC when, in fact, their clients were being held in the facility at the time. One attorney told us that when she went to the MDC to attempt to locate her client, MDC staff checked their "system" and informed her that her client was not housed at MDC. After she complained, another MDC employee came to the front desk, informed the attorney that her client was in the MDC, and authorized her to meet with him.

Another attorney told the OIG that he went to the MDC after front desk staff had informed his paralegal that his client was not housed at the facility. The attorney said he provided the MDC front desk staff with numerous combinations of his client's name, which contained five different parts. The attorney said he again was told that his client was not housed at the MDC. The attorney also visited the INS's Varick Street Service Processing Center in Manhattan in a failed effort to locate his client. In fact, his client was in the MDC at the time.

In addition to lifting the initial communications blackout for September 11 detainees, Cooksey's October 1, 2001, memorandum established a new inmate classification that was used for the September 11 detainees – Management Interest Group 155 (Group 155) – in part to address the lack of information the BOP was providing to attorneys and family members about the detainees. However, Cooksey's October 1 memorandum directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be "reviewed on a case-by-case basis by the FBI and cleared of any involvement in or knowledge of on-going terrorist activities."[93] As a result, the BOP continued

main inmate database, is updated daily with data on both sentenced and pre-trial inmates. The second public resource, the BOP Telephone Inmate Locator, provides callers with information on federal inmates. To obtain inmate information, the caller must have any one of the following criteria to provide to a BOP operator: BOP Register Number; U.S. Marshals Service Number, FBI Number, DCDC Number, or INS Number; or the inmate's first and last names and age.

[93] According to Cooksey's October 1 memorandum, all detainees who entered the MDC "on or after September 11, 2001" and "may have some connection to or knowledge of" the events of that day or terrorism activities, were to be housed "in the Special Housing Unit [SHU]" in the "tightest" allowable conditions until cleared by the FBI.

to use "WITSEC" as its primary designation for September 11 detainees and "Group 155" as a secondary designation. Therefore, the tighter restrictions that flowed from the WITSEC designation continued to apply to all September 11 detainees, and difficulties that families and attorneys had trying to locate the September 11 detainees continued.

Four senior managers at BOP Headquarters, including Senior Deputy Assistant Director John Vanyur, acknowledged to us that the BOP's initial designation of September 11 detainees as WITSEC inmates caused administrative confusion. The MDC Warden's Executive Assistant told the OIG that briefings for MDC staff in the weeks after the terrorist attacks did not provide clear guidance about how to handle inquiries from the public about September 11 detainees, particularly to staff assigned to the visitors' desk in the MDC's front lobby. MDC Warden Michael Zenk and the MDC Associate Warden for Programs both confirmed that staff at MDC's front desk had turned away visitors – including attorneys – who sought to contact September 11 detainees because of confusion surrounding the WITSEC/Group 155 designation initially assigned to the September 11 detainees.[94]

The WITSEC designation also impeded law enforcement interviews of September 11 detainees. MDC staff told the OIG that several law enforcement officials in the New York area who called the MDC to schedule detainee interviews shortly after the terrorist attacks were told that a particular detainee was not housed at the MDC. To address this problem, MDC staff established a process under which law enforcement officers contacted staff in the MDC Command Center or one of the Lieutenants responsible for supervising the ADMAX SHU in advance of their arrival to schedule an interview and to ensure that the September 11 detainee was housed at the MDC.

In response to the continuing confusion about access to the detainees and obtaining information about the detainees, the BOP established another new classification for September 11 detainees. In an October 31, 2001, memorandum, Cooksey removed the WITSEC designation for September 11 detainees in SENTRY, the BOP's inmate tracking database, but the Group 155 assignment continued to apply to the detainees. After October 31, when MDC staff at the front reception area searched for a September 11 detainee in SENTRY, a warning message referred to the detainee as a "SPECIAL SIS CASE." The staff was therefore alerted to contact the MDC's Special Investigative Supervisor (SIS), who determined whether the visitor had been cleared to meet with the detainee.

[94] Dennis Hasty was the MDC Warden at the time of the September 11 attacks and was replaced by Zenk in April 2002.

However, problems persisted even after this second re-classification because of the BOP's initial decision to classify September 11 detainees as WITSEC inmates. As late as March 1, 2002, the Captain of the ADMAX SHU e-mailed the MDC Warden and officials at BOP Headquarters requesting that September 11 detainees no longer be categorized as WITSEC inmates in the SENTRY system.[95] According to the Captain, the WITSEC designation was unnecessary and caused "confusion . . . at times attorneys are being turned away."

B. MDC's Special Housing Unit (SHU)

Because of the policy that all September 11 detainees were to be held in the most restrictive conditions at BOP facilities, they were placed in the MDC's Special Housing Units (SHU). In BOP institutions, SHUs are designed to segregate inmates who have committed disciplinary infractions or who require administrative separation from the rest of the facility's population.[96] According to BOP regulations, an employee called the Segregation Review Official is required to review the status of each inmate housed in the SHU on a weekly basis after the inmate has spent seven days in disciplinary segregation or administrative detention. In addition, that official is required to conduct a formal hearing every 30 days to assess the inmate's status.[97]

We found that the BOP did not review the status of each September 11 detainee on a weekly basis and did not conduct formal hearings monthly to assess the detainee's status. Rather, it relied on the FBI's assessment of "high interest." We reviewed the monthly SHU reports for the September 11 detainees we interviewed and found that each was annotated with the phrase "continue high security." MDC officials told the OIG that, if they did not receive notification from BOP Headquarters that the FBI had cleared a September 11 detainee, the detainee's monthly report was automatically annotated with the phrase "continue high security," without a hearing being conducted, and the detainee remained in segregation.

In addition, the September 11 detainees were housed in the most restrictive type of SHU – an Administrative Maximum (ADMAX) SHU. According to BOP officials, ADMAX units are not common in most BOP facilities because the conditions of confinement for disciplinary segregation or

[95] The Captain is the highest-ranking correctional officer with direct responsibility for custody operations in the ADMAX SHU. The Captain reports to the Associate Warden for Custody, who reports to the MDC Warden.

[96] BOP Program Statement 5270.07, Discipline and Special Housing Units.

[97] The 30-day review is documented on the BOP Special Housing Review form.

administrative detention in a normal SHU are usually sufficient for correcting inmate misbehavior and addressing security concerns. An ADMAX SHU has more restrictive conditions than a normal SHU. For example, the ADMAX SHU at the MDC, unlike a regular SHU, has a four-man hold restraint policy, hand-held cameras recording detainee movements, cameras in each cell to monitor detainees, and physical security enhancements.[98]

Conditions in the ADMAX SHU differ markedly from conditions in the MDC's general population. In the general population, inmates are allowed to move around the unit and use the unit's telephones. They also are not subjected to the movement and restraint policies enforced in the ADMAX SHU. In addition, detainees in the general population are permitted certain electronic equipment in their cells, such as small radios.

By contrast, as we describe below, detainees in the ADMAX SHU are restricted to their cells, have limited use of telephones with strict frequency and duration restrictions, and can only move outside their cells for specific purposes and while restrained and accompanied by MDC staff. Several September 11 detainees who spent time in the ADMAX SHU before being moved to the MDC's general population described the difference as "between night and day."

Prior to September 11, 2001, the MDC had a SHU, but not an ADMAX SHU. After the September 11 terrorist attacks, MDC staff contacted staff from the BOP's Metropolitan Correctional Center (MCC) in Manhattan for assistance in establishing an ADMAX SHU.[99] The MDC quickly created an ADMAX SHU from one part of its existing SHU. This ADMAX SHU was only partially operational when the first September 11 detainees arrived on September 14, 2001. According to MDC officials, the unit became fully operational by October 15, 2001, when MDC management distributed operating procedures to staff assigned to the ADMAX SHU.

Each wing has 31 cells and a capacity of 60 inmates per wing. The wings are divided into two blocks of cells called "ranges." September 11 detainees were housed in individual cells in the SHU range that was converted to an ADMAX SHU. As more detainees were transferred to the MDC, two and at times three detainees were housed in a single cell in the ADMAX SHU. MDC staff told the OIG that as many as 60 detainees were housed in the ADMAX SHU at one time.

[98] The structure and policies of the MDC's ADMAX SHU are discussed in more detail later in this chapter.

[99] The MCC in Manhattan had created an ADMAX SHU after one of its correctional officers was seriously injured by a terrorist housed in the MCC's regular SHU who had been convicted of involvement in the 1998 embassy bombings in Kenya and Tanzania.

In an effort to improve security, the MDC also initiated a series of structural changes to the ADMAX SHU in early October 2001 that were completed in mid-November 2001. The changes included:

- Heavy iron grillwork was installed between the SHU area housing September 11 detainees and the area housing inmates in other SHU ranges;

- Two stationary security cameras were installed in each ADMAX cell, each mounted on the wall at ceiling height. The MDC previously had installed cameras for viewing the range hallway in front of the SHU cells. Monitors for viewing the cameras in the corridors and the new cameras installed in the cells were located in the officer-in-charge's room; and

- A video camera mounted on a tripod or held by an MDC staff member was used to record all movement of September 11 detainees. Video recording equipment, linked to the stationary cameras in the cells, was located in a locked room adjacent to the ADMAX SHU.

The cells in the ADMAX SHU contained a set of bunk beds, toilet and sink fixtures, a shower, and a small seating area.



Image 1: These pictures depict a typical ADMAX SHU cell and show (moving clockwise from top left) the bunk bed, shower, seating area, and combination toilet and sink fixture. *Photographs dated May 1, 2002.*

Detainees and MDC staff used a multipurpose room located at the end of the ADMAX SHU range for medical examinations, strip searches, recreation, and individual meetings.



Image 2: This picture shows a multipurpose room on the ADMAX SHU range that is equipped for detainee medical examinations. *Photograph dated May 1, 2002.*

A modified food preparation area was located between the ADMAX range and the regular SHU ranges on the MDC's ninth floor. Normally, inmate food at the MDC is served on hard plastic trays, but food for the September 11 detainees was transferred to foam plates to prevent the detainees from using plastic trays as weapons.

The recreation area in the ADMAX SHU consisted of four cell bays enclosed by chain link fencing on all sides and the ceiling. The roofs of the four recreation cells, located on the top floor of the MDC, were open to the outside. Due to security concerns, MDC staff did not provide recreation equipment to September 11 detainees housed in the ADMAX SHU.



Image 3: This picture shows the ADMAX SHU recreation cells as viewed from the last recreation cell. *Photograph dated May 1, 2002.*

Visitors, attorneys, and family members met with September 11 detainees in a special visitation area adjacent to the ADMAX SHU range. All visits between detainees and their attorneys or family were "non-contact," meaning physical contact between parties was prevented by a clear partition. Correctional officers were not present in the special visitation areas during these visits.



Image 4: These photographs show two views of the non-contact visiting area used by September 11 detainees in the ADMAX SHU. *Photographs dated May 1, 2002.*

Law enforcement visitors to the ADMAX SHU were permitted contact visits with September 11 detainees in a separate visiting area across from the non-contact area.



Image 5: These pictures show two views of the contact visiting area in the ADMAX SHU. *Photographs dated May 1, 2002.*

C. ADMAX SHU Policies and Procedures

Officials at the MDC combined existing BOP policies for disciplinary segregation and administrative detention to create policies and procedures governing September 11 detainees housed in the ADMAX SHU.[100] The following procedures were implemented for these detainees on September 20, 2001:

- One social telephone call a month;
- One legal telephone call a week;

[100] Disciplinary segregation has more restrictive conditions than administrative detention. For example, an inmate in disciplinary segregation is entitled to one social telephone call a month, while an inmate in administrative detention is entitled to one social telephone call a week. Administrative detention is considered non-punitive and is used to house either inmates who pose a threat to themselves or facility staff, or inmates in protective custody. According to BOP Program Statements, administrative detention is designed for short periods of time unless the inmate requires long-term protection or presents "exceptional circumstances, ordinarily tied to security or complex investigative concerns."

- A correctional counselor was required to stand in front of the cell while detainees completed all telephone calls (according to BOP officials, this was done for security purposes and not in an effort to monitor the detainee's conversation);

- All requests to use the telephone had to be made using a "copout" form, which we describe below;

- Legal and social visits, except by law enforcement officers, were non-contact;

- Detainees remained in restraints while out of their cells. The MDC imposed three different restraint policies on the September 11 detainees:

 - Routine escort: handcuffs and leg irons;

 - When required to sign forms, be interviewed, or for visitation: handcuffs, leg irons, and "Martin Chain" (approximately four feet of heavy chain that links the leg irons to the handcuffs);

 - When escorted from the institution: handcuffs, handcuff cover with padlock, Martin Chain, and leg irons.

- Three staff members and one Lieutenant were present each time a detainee was placed into restraints and escorted from a cell. During this "four-man hold," one of the staff members was required to operate the portable video camera; and

- Detainees remained in restraints during non-contact visits with attorneys or family members.

D. Detainee Complaint Process

September 11 detainees had two methods to make a request or file a complaint about their treatment or conditions at the MDC – the "copout" and the Administrative Remedy Program. The copout, a process in which detainees identify concerns to MDC staff, was the primary method for detainees to request telephone calls (social and legal), medical care, or resolution of visitation problems.[101] The copout, while not an official complaint process, was used by detainees to request staff assistance for a variety of issues.

[101] BOP Program Statement 5511.07, Inmate Request to Staff.

In contrast, the Administrative Remedy Program is the BOP's formal process for filing a complaint, such as an allegation of physical or verbal abuse against facility staff. Detainees (or inmates) are expected to exhaust all informal methods for resolving their concerns, such as submitting copouts, before filing complaints under the Administrative Remedy Program.[102]

IV. HOUSING ASSIGNMENT OF SEPTEMBER 11 DETAINEES

A. Assignment of September 11 Detainees to the ADMAX SHU

As described above, the MDC did not follow the BOP's inmate security risk assessment procedures for determining where to house the September 11 detainees. Instead, MDC officials relied on the FBI's assessment that the detainees generally were "of high interest" to its ongoing terrorism investigation and automatically placed them in the MDC's most restrictive housing conditions – the ADMAX SHU.

The first September 11 detainees arrived at the MDC on September 14, 2001. Initially, Dennis Hasty, the MDC Warden at the time, and the former Associate Warden for Custody told us they were under the impression that the MDC would be asked to house only about 16 September 11 detainees, the capacity of one block of SHU cells if each detainee was housed individually.[103] However, the number of September 11 detainees sent to the MDC soon exceeded their original expectations as the FBI arrested additional aliens and classified them "of high interest." At the time, the MDC was the only detention facility in New York City operational and suitable for housing detainees under highly restrictive conditions.[104]

Officials from the BOP's Northeast Region and BOP Headquarters told MDC staff that they believed that September 11 detainees who were sent to the MDC were "suspected terrorists." However, as discussed previously, from our interviews and document reviews we determined that the FBI did not have a formal process for making an initial assessment of a detainee's possible links to terrorism, and this assessment lacked specific criteria and was applied

[102] BOP Program Statement 1330.13, Administrative Remedy Program.

[103] A 17th cell along the block was used for isolation purposes (e.g., an inmate on suicide watch). This isolation cell had bars traversing the front of the cell so that correctional staff could view the occupant at all times. Each of the other 16 SHU cells had a solid door with a small window.

[104] The MCC in Manhattan had an ADMAX SHU. However, because of security and logistical concerns associated with its proximity to the World Trade Center, the MCC did not accept new inmates during the weeks after the attacks.

inconsistently. The BOP's Northeast Region Counsel explained to the OIG that the BOP accepted this assessment, since the BOP normally takes "at face value" FBI determinations that detainees had a potential nexus to terrorism and therefore were "high-risk."

Under standard BOP practice, newly arrived inmates are kept separate from an institution's general inmate population for the first 30 days while staff conducts risk assessments to determine whether the inmates can be released safely into the general population. We found no evidence that MDC staff performed any of the normal risk assessments on the September 11 detainees, because the detainees were assigned automatically to the ADMAX SHU.

B. Reassigning September 11 Detainees to the General Population

We found that even after September 11 detainees who had been placed in the ADMAX SHU were finally "cleared" by the FBI, some remained in the ADMAX SHU for days or weeks after they were supposed to be transferred to the MDC's less restrictive general population.

1. Centralizing the Notification Process

As discussed in Chapter 4, prior to October 1, 2001, the FBI New York Field Office and the INS New York District Office developed their own procedures to clear local September 11 detainees using staff who served on the New York Joint Terrorism Task Force (JTTF). When the FBI liaison to the New York JTTF told the INS and BOP liaisons that the FBI had no further investigative interest in a particular detainee, the BOP liaison drafted a clearance memorandum to the MDC Warden or Captain. When the Warden received this memorandum, the detainee could be "normalized" (i.e., released to the general population).[105]

However, this process did not occur quickly, even after the FBI cleared the detainee. According to the OIG's data analysis, before October 2001, the MDC received notification that the FBI had cleared a September 11 detainee an average of 15 days after the FBI's New York Field Office had actually cleared the detainee.

On October 1, 2001, the process for transferring the detainees from the ADMAX SHU to the general population was centralized to BOP Headquarters in Washington, D.C. Under the new process, the FBI's New York Field Office informed FBI Headquarters that a detainee was no longer of investigative interest to its terrorism investigation. Subsequently, staff in the International

[105] A copy of such a memorandum is attached as Appendix J.

Terrorism Operations Section at FBI Headquarters coordinated CIA checks for detainees before issuing clearance memoranda.

The BOP employee who served as a liaison to FBI Headquarters during this period told the OIG that he generally checked with the FBI on a daily basis for new clearance memoranda for September 11 detainees.[106] The liaison said that once a clearance memorandum was issued, he notified the Intelligence Section at BOP Headquarters, either by e-mail or in his weekly report, that the FBI had cleared a specific September 11 detainee. Staff in BOP's Intelligence Section then prepared a memorandum from Cooksey, the BOP's Assistant Director for Correctional Programs, to the Warden of the BOP institution in which the detainee was held. The "Cooksey memorandum," as it became known, formally notified a BOP Warden that a detainee was no longer considered "high risk" and that his conditions of confinement could be normalized.

After the FBI and BOP implemented this centralized process, the time it took for a BOP facility to receive notice that an inmate was no longer considered "high risk" lengthened. Our analysis found that the MDC received notice from BOP Headquarters, via a Cooksey memorandum, an average of 32 days after the FBI New York Field Office had cleared a September 11 detainee. The range of these cases varied from a minimum of 7 days after the FBI New York Field Office's clearance for one detainee to 109 days for another detainee.

BOP officials told us that they would not transfer a September 11 detainee to an institution's general population prior to receiving the FBI clearance notification via the Cooksey memorandum. We found inconsistencies in this policy, which we discuss in the next section. Moreover, BOP officials explained that the process to transfer an inmate to the general population after receiving clearance could take several days. The Cooksey memorandum permitted the MDC to assess detainees using normal BOP policies to place them in appropriate housing. After receiving a memorandum on a particular detainee, the MDC conducted its own assessment of the detainee, and BOP officials said it took time to review records and interview correctional officers as part of this assessment. BOP officials told us that they were aware of two detainees who unintentionally were left in the ADMAX SHU after the MDC received the Cooksey memorandum, due to administrative errors. They also stated that they were aware of a third detainee who received

[106] The BOP liaison stated that he checked with the FBI daily until the end of April 2002, by which time the number of September 11 detainees held in BOP facilities was drastically reduced. The liaison said that starting in May 2002 he monitored the issuance of FBI clearance memoranda once or twice weekly.

a Cooksey memorandum but remained in the ADMAX SHU because of disciplinary problems.

The efficiency of the FBI clearance process and the length of time it took BOP Headquarters to notify the MDC of a detainee's clearance were significant because they dictated when a September 11 detainee could be released to the MDC's general population, where detention conditions were markedly less restrictive.

2. Inconsistencies in Detainee Reassignment Procedures

We also found that the MDC inconsistently applied the Cooksey memorandum process for transferring September 11 detainees from the ADMAX SHU to the general population. Of the 53 detainees in our MDC sample, 23 received Cooksey memoranda; 20 never received Cooksey memoranda; and 10 were cleared using the local procedures in effect prior to centralization of the process at FBI and BOP Headquarters on October 1, 2001. Of the 20 detainees who never received Cooksey memoranda, 14 were transferred from the MDC,[107] 5 were released into the general population without FBI clearances,[108] and 1 was released on bond.

Our analysis of the 23 detainees in our MDC sample who received Cooksey memoranda determined that FBI Headquarters took an average of 107 days to clear the detainees of any connection to terrorism, and the MDC received this notification an average of 24 days after the detainee was actually cleared by FBI Headquarters.[109] In response to OIG questions, BOP management offered no explanation for why it took, on average, more than one month to issue Cooksey memoranda after the FBI had cleared the September 11 detainees.

[107] Detainees removed from the institution were returned to INS custody, transferred to another BOP institution, or removed from the United States. One detainee in our sample was released on bond.

[108] We asked MDC management for an explanation for why detainees were released into the general population without FBI clearances. They were unable to provide an explanation.

[109] The time it took the MDC to release the inmate into the general population, after the FBI clearance was received, ranged from 5 to 119 days in our sample. In the 119-day case, the detainee had entered the MDC on October 4, 2001, and was cleared by the FBI on December 19, 2001. However, he was not released to the MDC's general population until April 17, 2002. According to Warden Zenk, the detainee's continued confinement in the ADMAX SHU for 119 days after he was cleared by the FBI "was due to an administrative error" on MDC's part and was uncovered after BOP Headquarters performed an audit of September 11 detainees.

Our analysis of the records of the 23 detainees who received a Cooksey memorandum showed that 4 of the 23 detainees were released into the general population prior to a Cooksey memorandum being received. Further, three of these four detainees did not have FBI clearances prior to being released into the general population. While it is possible that the MDC could have learned that a detainee had been cleared by the FBI from a source other than a Cooksey memorandum, such deviation from the standard procedure is noteworthy given the BOP's adherence to other rules developed to ensure that the September 11 detainees did not present a risk to the facility's staff or other inmates.

Case Study 1:

A September 11 detainee arrested in New York City arrived at the MDC on November 5, 2001. More than six months later, on May 16, 2002, the FBI officially determined that the detainee was of "no investigative interest" regarding the September 11 attacks or terrorism in general. However, a BOP Intelligence Liaison in the SIOC at FBI Headquarters wrote that "due to an internal FBI admin[istrative] error," notification from the FBI to the BOP that the detainee had been cleared was not received by the BOP until June 13, 2002.

The Cooksey memorandum for this detainee issued by BOP Headquarters arrived at the MDC on June 14, 2002. The detainee was released into the MDC's general population later that same day, more than seven months after his arrest and almost one month after the FBI had cleared him.

V. ACCESS TO LEGAL COUNSEL

This section examines the access to counsel afforded September 11 detainees while housed in the MDC. We focus on the policies and procedures implemented by the MDC that affected these detainees' access to counsel. We also examine how the MDC's initial communications blackout and the detainees' WITSEC classification affected the availability of legal calls, access to pro bono attorney lists, and the ability of their attorneys to meet with them.

A. Legal Telephone Calls

We found that the BOP's decision to house September 11 detainees in the most restrictive confinement conditions possible severely limited the detainees' ability to obtain, and communicate with, legal counsel.

Under applicable BOP policies, MDC officials had significant discretion to determine the frequency and length of the detainees' legal telephone calls. Yet, we found that the MDC adopted procedures for September 11 detainees more appropriate for pre-trial inmates who had obtained counsel prior to their detention, rather than for individuals like the September 11 detainees, the vast majority of whom had no legal representation upon arriving at the MDC and needed to secure counsel.[110]

The BOP's national policy on attorney telephone calls states that inmates should be afforded the opportunity "to place an occasional unmonitored call to his or her attorney . . . frequent calls should be allowed only when an inmate demonstrates that communication with his or her attorney by other means is not adequate." BOP regulations do not specify an acceptable number of inmate legal telephone calls, nor does the policy define what level of attorney communication is "not adequate."[111] MDC officials told us that in accordance with BOP Headquarters's instructions to maintain the tightest restrictions possible on the September 11 detainees, they decided to adopt a practice of permitting detainees one legal telephone call per week. The MDC's legal call practice did not violate any BOP policy because, given the absence of existing written guidance from BOP Headquarters, MDC management was given broad discretion to develop and implement a facility-specific legal call policy for the detainees.

MDC unit managers and counselors controlled the process for placing legal telephone calls for detainees housed in the ADMAX SHU. Detainees who wanted to make a legal call had to submit a written request known as a "copout." A unit counselor described the process for placing legal telephone calls in the ADMAX SHU once a September 11 detainee submitted a copout:

- The counselor or unit manager plugged a telephone into an unmonitored line outside of the detainee's ADMAX SHU cell;

- The detainee provided the MDC employee with a telephone number, which the counselor or unit manager dialed and verified that the unmonitored call was placed to the detainee's attorney;

[110] For example, the BOP has no national policy regulating the number or length of telephone calls that inmates in an ADMAX SHU can make to their attorneys. Neither BOP Headquarters nor the MDC developed new policies addressing the unique needs of September 11 detainees regarding telephone access to allow them to obtain attorneys or place legal calls.

[111] An exception in the written policy is when the inmate or the inmate's attorney demonstrates an imminent court deadline.

- The counselor passed the telephone to the detainee through the horizontal slot in the cell door; and

- The counselor remained at the cell door until the detainee completed his call.

In addition to the written copout process, our interview with the ADMAX SHU unit counselor and our review of the MDC Legal Call Log revealed that the unit counselor made rounds to offer legal calls to September 11 detainees, at the most, 2 to 3 times per week. In fact, our review of the Legal Call Log and copout records revealed that between September 17, 2001, and April 3, 2002, there were six periods of over seven days in which the counselor did not make rounds in the ADMAX SHU to offer detainees the opportunity to place legal calls. Three of these periods were between September 17, 2001, and January 2, 2002, and lasted 28, 16, and 8 days. The other three periods were between January 8 and April 3, 2002, and lasted 20, 16, and 8 days.

Three September 11 detainees interviewed by the OIG said that each time the unit counselor made rounds through the ADMAX SHU he simply asked detainees "are you okay?" The three detainees said that, initially at least, they did not realize that this question was shorthand for, "Do you want a weekly legal telephone call?" A unit counselor confirmed to the OIG that when he made rounds through the ADMAX SHU to provide legal calls, he asked the September 11 detainees, "Are you okay?" to determine whether they wanted to make legal calls. Detainees we interviewed reported that an affirmative response to the question of whether they were "okay" resulted in them not receiving a legal telephone call that week.

The Associate Warden for Programs, the ADMAX SHU unit manager, and a unit counselor told us that if a detainee declined an opportunity to make a legal call, this refusal was not always recorded in the MDC's Legal Call Log. Our analysis also found that legal call refusals were not consistently annotated in the log. The Associate Warden said that the unit counselor prepared a weekly memorandum that listed the names of the detainees who refused legal calls that week.

We analyzed the weekly legal call memoranda, the Legal Call Log, and copouts for legal calls submitted by the 19 September 11 detainees we interviewed at the MDC. The first legal call made by any September 11 detainee, according to these three sources, was not until October 15, 2001.[112]

[112] In order to assess the placement of legal calls by September 11 detainees, we requested the telephone records for the unmonitored telephone lines used by the detainees in the ADMAX SHU. The telephone company stated that it could not isolate telephone line extensions within the MDC. Additionally, MDC Warden Zenk informed us that the MDC (cont'd)

Yet, the MDC was notified via conference call by the BOP Northeast Region that legal telephone calls could be made by detainees as of September 20, 2001.

Based on the length of time spent in the ADMAX SHU, the 19 detainees we interviewed collectively should have been offered 383 opportunities to make legal phone calls. The Legal Call Log lists 200 legal calls made by these detainees.[113] We also reviewed 60 memoranda with the names of detainees who declined their legal calls and 27 copouts for which there are no corresponding entries in the log. We concluded that, at best, detainees in our sample were offered 287 legal telephone calls, far less than one legal call per detainee per week.

The detainees we interviewed also stated they were not always offered weekly legal calls. Seven of the 19 September 11 detainees we interviewed stated that they did not complete legal telephone calls and were not visited by attorneys from the time they arrived at the MDC in mid-October until mid-December 2001. When detainees began placing legal calls from the ADMAX SHU in mid-October 2001, 15 of the 19 detainees we interviewed told the OIG they were permitted, at most, one legal telephone call per week. Three detainees told us that they never were offered legal telephone calls, and one detainee stated that he was denied legal calls as part of disciplinary punishment. A review of the Legal Call Log indicates that this particular detainee placed one legal call during the month he spent in the ADMAX SHU.

Fourteen of the 19 detainees were not offered their first legal phone calls within 7 days of arrival at the MDC. Of this group of detainees, the earliest legal phone call was offered ten days after arrival. One detainee was not offered his first legal phone call until 42 days after arrival. The average time from arrival to the first offer to make a legal phone call for the 14 detainees was 17 days.

We found that of the 287 legal telephone calls offered, 101 (37 percent) were offered more than seven days apart. In response to this finding, the MDC unit counselor said he offered weekly legal calls and the detainees' statements to the contrary were inaccurate.

Even when MDC offered detainees telephone calls, the MDC's response to unsuccessful attempts to contact attorneys by telephone was arbitrary. Four of the 19 detainees we interviewed told the OIG that legal calls resulting in a

telephone system did not have the capacity to retrieve the detainees' telephone records that we requested. Therefore, we were not able to independently verify the information in the MDC Legal Call Log or on the legal call copouts.

[113] We obtained corresponding copouts for 123 of the legal calls.

busy signal or calls answered by voicemail counted as their one legal call for the week. In addition, six detainees told the OIG that their calls to attorneys on the pro bono attorney list that resulted in no answer, were a wrong number, or resulted in a refusal to provide legal services counted as the detainees' legal call for that week. The unit counselor disputed these claims, stating that a "no contact" or busy signal did not count against the detainee as his sole weekly legal call. The unit counselor told the OIG that if the line was busy or the call could not be placed for some other reason, he tried to provide another legal call to the detainee the next time he made rounds in the ADMAX SHU. Yet, the Legal Call Log, which lists 200 total calls for September 11 detainees, indicates at least four instances when a "no contact" or busy signal counted as a detainee's weekly legal call. Moreover, the Associate Warden for Programs, the ADMAX unit manager, and a second unit counselor acknowledged to the OIG that reaching an answering machine counted as a completed legal call, although encountering a busy signal did not. This meant that for some detainees, if they reached an answering machine while trying to obtain an attorney during their one weekly telephone call, they would not be permitted another legal call for a week.

Also, according to six September 11 detainees we interviewed, unit counselors unilaterally hung up the telephone when a detainee's legal call lasted longer than three minutes. The ADMAX SHU unit counselor denied this allegation and stated that he did not limit the length of detainees' legal calls. The Legal Call Log, which is supposed to track the length of detainee legal calls, shows most calls lasting at least 5 minutes, with the longest call noted as 34 minutes.

In late November 2001, at least 20 September 11 detainees at the MDC staged a hunger strike to express dissatisfaction with their confinement and the conditions in the ADMAX SHU, including the restrictive telephone policies. Four of the 19 September 11 detainees we interviewed said they refused food beginning in late November 2001 to protest a lack of attorney telephone calls, among other issues. A daily ADMAX SHU report filed on November 28, 2001, confirmed the hunger strike, and noted that 20 of the September 11 detainees were refusing to eat, in part because of concerns about limited legal telephone calls.[114]

Case Study 2:

We interviewed a September 11 detainee at the MDC who was arrested on September 26, 2001. He said he was originally arrested after the New York JTTF executed a search warrant for his

[114] We discuss detainee hunger strikes at the MDC in greater detail in Section VII of this chapter.

apartment. He was suspected of social security fraud, insurance fraud, and credit card fraud. He also was suspected of working with others in a scheme to provide funds to al Qaeda. He was immediately transferred to INS custody and spent approximately one day at the INS Varick Street Service Processing Center. He told us he was never informed as to why he was arrested but said he later pleaded guilty to marriage fraud.

Based on the Legal Call Log, the detainee was not offered a legal call until October 15, 2001. That call was listed as a completed 10-minute call. According to the Legal Call Log, the detainee was not offered his next legal call until November 7, 2001, which the ADMAX SHU Counselor recorded as being refused by the detainee. The log showed that on December 17, 2001, the detainee made his next legal call, the result of which was an incomplete "no answer." This detainee refused three legal call offers in January 2002, according to weekly memoranda that recorded the detainees who did not wish to make a legal call.

The detainee told us that he was given a pro bono attorney list by MDC staff in October 2001. He stated that he tried to contact several legal services providers on the list, but received no responses when he called the numbers listed. He denied being offered the opportunity to make a legal phone call in November 2001. The detainee also stated that he was not allowed to make a social call to his sister for the first three months he was incarcerated at the MDC. He said that in December 2001, he finally contacted his sister and that by mid-January 2002, his sister had obtained legal representation for him, approximately four months after he entered the MDC.

B. Attorney Visits

The BOP's classification of September 11 detainees as WITSEC inmates also hampered their ability to visit with attorneys long after the MDC lifted its initial communications blackout. Even though MDC officials developed procedures to permit meetings between detainees and their attorneys in the ADMAX SHU, the continuing confusion on the part of MDC staff who interacted with attorneys about the location of detainees made the attorneys' ability to visit their clients more difficult.

The first attorney visit recorded for a September 11 detainee at the MDC took place on September 29, 2001. The next two attorney visits for different detainees were noted on October 10, 2001. According to the Associate Warden

for Programs, the MDC did not allow September 11 detainees any visitors for about three weeks after the terrorist attacks. During this communications blackout period, MDC staff told attorneys who sought to visit September 11 detainees that information on the detainees was not available. Instead, MDC staff referred the attorneys to the BOP's National Locator Service, which, as we discussed previously, contained no information about September 11 detainees due to their WITSEC classification.

By the end of the first week in October 2001 (after the communications blackout was lifted), the MDC instituted the following new screening procedures to determine whether attorneys could meet with September 11 detainees:

- MDC staff referred an attorney seeking to visit a September 11 detainee to the Associate Warden for Programs;

- The Associate Warden called an Assistant United States Attorney to verify the credentials of the lawyer requesting to visit a detainee in the ADMAX SHU;

- The Associate Warden contacted the attorney to verify that the attorney represented a specific detainee or wanted to meet with a certain detainee to discuss representation; and

- If the attorney met the above criteria, the Associate Warden prepared a memorandum approving the attorney's visit, which she sent to staff stationed at the MDC's front desk. This approval for visitations by the Associate Warden also was effective for future visits by the attorney to the same detainee.

When an attorney seeking to visit a September 11 detainee arrived at the MDC and provided the name of his or her client, the desk officer checked two lists which were updated daily: a general, sanitized roster of all MDC inmates that did not include WITSEC/Group 155 inmates, and a list of "separatees" – inmates who had been separated from the general population for a variety of reasons. However, the Associate Warden for Programs, the MDC Captain, and MDC reception area staff told the OIG that the September 11 detainees were not on either list. Instead, their names were kept on a third list maintained elsewhere in the MDC in order to control access to the information. This list was not kept at the MDC reception area. Therefore, if an attorney asked about a detainee whose name was not on either of the two daily lists available to the officer at the front desk, and the attorney had not obtained prior approval for visits from the Associate Warden, the desk officer told the attorney that the detainee was not present at the facility (when, in fact, the detainee may have been incarcerated in the ADMAX SHU).

Five New York-area attorneys told us that they were unable to meet with their September 11 detainee clients for many weeks because MDC staff told them that their clients were not housed at the MDC. Four of the attorneys each represented one detainee and one attorney represented several MDC detainees. According to the attorneys, they were not permitted to visit their clients during the second week of November 2001, and the first weeks of December 2001, February 2002, and March 2002. The attorneys said they were turned away either over the telephone or when they showed up at the MDC. According to the attorneys, no MDC officials mentioned any clearance procedure they needed to follow in order to visit their clients.

Eventually, these attorneys did gain access to their clients, and by the time of our May 2002 site visit to the MDC, all of the attorneys we interviewed said they were not having problems obtaining access to their clients at the MDC.

C. Pro Bono Attorney List

As noted above, most of the September 11 detainees had not hired attorneys before entering the MDC and, consequently, needed to solicit legal representation when initially incarcerated in the MDC. For example, 17 of the 19 September 11 detainees we interviewed said they did not have attorneys when they arrived at the MDC. The remaining two detainees had retained attorneys during their stays at other detention facilities before they were transferred to the MDC.

We found that the INS did not consistently provide September 11 detainees with lists of attorneys who would take immigration clients without compensation (known as "pro bono" cases). Several of the detainees we interviewed said that they did not receive the pro bono lists until days or months after their arrival at the MDC.[115] We also found that the lists they eventually received contained significant inaccuracies, including wrong telephone numbers and numbers for attorneys who were unwilling or unable to take the September 11 detainees as clients because they only handled immigration asylum claims.

[115] Eleven of the 19 September 11 detainees we interviewed said they received pro bono attorney lists from ADMAX SHU counselors within the first month of entering the MDC. However, four detainees stated that they did not receive the list for more than a month, and one detainee stated that he never received a pro bono attorney list. Two September 11 detainees we interviewed were unsure when they received the list, and one detainee's attorney advised him not to respond to our question.

As stated previously, the BOP classified the September 11 detainees as pre-trial inmates. The BOP has no policy that requires its staff to provide lists of pro bono attorneys to pre-trial inmates arrested by the INS. On the other hand, federal regulations specify that INS officers who processed the September 11 detainees after they were arrested were responsible for providing the detainees "with a list of the available free legal services . . . located in the [INS] district."[116] The Executive Office for Immigration Review (EOIR), part of the Department of Justice, maintains lists of pro bono attorneys who offer free legal services to immigration detainees in each INS District and distributes these lists to detention facilities holding immigration detainees.

In addition, Immigration Judges overseeing removal proceedings for the September 11 detainees also are required to, "[a]dvise [detainees] of the availability of free legal services . . . located in the [INS] district".[117] The INS requires that staff members at all of its detention facilities, including contract facilities, enable detainees to make calls to attorneys on the INS-provided pro bono list.

According to the MDC's Associate Warden for Programs and the ADMAX SHU Captain, when the BOP lifted its restriction on telephone calls for September 11 detainees on October 1, 2001, MDC staff obtained a list of pro bono attorneys from the INS within a week and provided that list to detainees. However, the MDC staff we interviewed, including the Associate Warden, stated that the list contained inaccurate telephone numbers.

As described above, some detainees told us that their calls to attorneys on the pro bono list that resulted in no answer, were clearly an inaccurate number, or resulted in a refusal to provide legal services counted as the detainees' legal calls for that week. Consequently, the inaccurate pro bono attorney list affected detainees' ability to contact counsel in a timely manner. The Associate Warden and the ADMAX SHU Captain told the OIG that they obtained more accurate pro bono lists from EOIR and the INS between mid-October and early November 2001.

D. Social Visits

We found that BOP's classification of September 11 detainees as WITSEC/Group 155 inmates, and the resulting confusion this designation caused MDC staff, prevented or delayed many of the detainees' visits from family members.

[116] 8 C.F.R. § 287.3(c).

[117] 8 C.F.R. § 240.10(a)(2).

In order to schedule a social (as opposed to an attorney) visit, September 11 detainees had to provide a list to MDC staff of which family members they wanted to be able to visit them. The same problems that attorneys encountered in attempting to visit their clients at the MDC hindered the detainees' family visits as well. Three detainees we interviewed said family members on their lists were told by MDC staff that the detainees were not housed at the MDC when, in fact, the detainees were in the facility.

As discussed previously, the BOP made changes in the detainees' classification status at the end of October 2001 after realizing that its original WITSEC/Group 155 designations were causing problems for MDC staff in handling requests for visits from detainees' attorneys and family members. The BOP also added notations in its SENTRY inmate tracking system whenever a September 11 detainee's name was queried before staff authorized a visit. The messages were designed to alert MDC staff about information that could and could not be released about these detainees (e.g., "Special SIS case – do not disclose location – notify SIS of inquiry"). We found, however, that the detainees' redesignation in the BOP system did not mean that MDC staff provided better assistance to detainees' visitors. The MDC's Associate Warden for Programs told the OIG that MDC management sought to address the social visitation problem by training reception area staff on proper procedures for granting visitation to detainee family members. However, problems persisted, as illustrated by the following case study.

Case Study 3:

One September 11 detainee was held at the MDC from October 16, 2001, until June 14, 2002. His wife said she experienced repeated problems while attempting to visit her husband. The woman, who took unpaid leave from work to travel from her home in New Jersey to the MDC, said that between October and December 2001 she was told by staff at the MDC visitors' desk that her husband was not incarcerated at the facility when, in fact, he was. When she eventually learned her husband was at the MDC, she visited him for the first time on December 19, 2001, after being granted a "special visit" by the unit manager at a date and time outside the normal visiting schedule. From January 31 to March 31, 2002, the woman said she was not permitted to visit her husband because he was being disciplined for failing to stand up for a 4:00 p.m. daily count.

The woman subsequently was permitted to visit her husband during the week of April 2, 2002. However, she was not permitted to visit her husband the week of May 1, 2002, because she arrived at the MDC on a day and at a time that MDC reception area staff told her was not the appropriate time to visit detainees held in the ADMAX SHU. The woman told the OIG that she

assumed this was an appropriate time because it was the same day of the week and hour of her previous "special visit." When she contacted the ADMAX SHU unit manager about this particular visitation problem, he arranged for another "special visit" which took place on May 4, 2002. On May 9, 2002, the detainee's wife arrived at the MDC to visit her husband but MDC staff told her that all the visitation rooms were full. She was asked to wait until after the 4:00 p.m. inmate count for a possible visit at 4:30 p.m. At 4:30 p.m., the reception staff told her to go home and call the following day. On May 10, 2002, the detainee's wife said she was unsuccessful in contacting anyone at the MDC to arrange a visit with her husband.

As of May 10, 2002, the woman had succeeded in visiting her husband three times during his more than five months of confinement in the ADMAX SHU.

E. Contact with Foreign Consulates

Similar to the problems experienced by attorneys seeking access to their September 11 detainee clients, the BOP's categorization of these detainees as WITSEC inmates inhibited the ability of consular officials to determine whether individuals from their countries were held at the MDC. Beyond that issue, however, we found that MDC staff did attempt to facilitate visits by foreign consulates that requested meetings with detainees from their countries.

The federal government's policy regarding consular access to incarcerated foreign nationals applies whether the detainees are in the custody of the BOP or the INS. Federal regulations state:

> Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries . . . require immediate communication with appropriate consular or diplomatic officers whenever nationals . . . are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf.[118]

According to Michael Rozos, Chief of the INS's Long Term Review Branch, INS agents who arrested September 11 detainees on immigration violations were required to inform the aliens that they had a right to contact consular or diplomatic officers from their country of nationality in the United States. Rozos acknowledged that if aliens express an interest in making such contacts, the INS is required to facilitate that request, usually by providing the detainee access to a telephone along with the number for the appropriate consulate.

[118] 8 C.F.R. § 236.1(e).

INS regulations specifically provide that an alien detained by the INS "shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." Therefore, the INS was responsible for informing the September 11 detainees of their rights to contact their consular representatives, even for those detainees who were first held at BOP facilities like the MDC. The INS uses a form to document that it asked detained aliens if they wanted to contact their consulate.[119] Of the 44 A-Files we were able to review for the September 11 detainees in our MDC sample, only 10 detainees had copies of this form in their files.

BOP policy requires that "whenever it is determined that an inmate is a citizen of a foreign country, the Warden shall permit the consular representative of the country to visit on matters of legitimate business. A Warden may not deny this privilege even if the inmate is in disciplinary status."[120] MDC Warden Zenk said that the MDC's role was limited to providing detainees with consular telephone calls upon their request and to facilitate detainees' meetings with consular officials after MDC staff conducted appropriate screenings of the consular officials. He said that the MDC did not have responsibility for notifying detainees' consulates about their incarcerations.

Zenk told the OIG that the MDC was not contacted by any foreign consulates about September 11 detainees in the two weeks immediately following the September 11 attacks. Zenk and the Associate Warden for Programs said that beginning in October 2001, all inquiries from consulates to the MDC were directed to the Warden's Executive Assistant, who served as the point of contact for consular representatives seeking to visit September 11 detainees at the MDC. According to Zenk, the MDC carefully screened consular personnel before permitting them to visit with September 11 detainees. He said consulates were required to submit a written request stating the name of the detainee to be visited and the names of the visiting consular officials. When the visitors were approved, the Executive Assistant or the Associate Warden for Programs forwarded a memorandum officially approving the visits to the MDC's front desk to inform MDC staff of the impending consular visit.

However, similar to the difficulty experienced by detainees' attorneys and family members seeking to meet with them, the MDC detainees' designation as

[119] INS Form I-213, "Notice to Arrested or Detained Foreign Nationals Consular Notification and Access."

[120] BOP Program Statement 5267.06, Visiting Regulations.

WITSEC inmates made it difficult for consulates to contact detainees who were citizens of their countries. For example, on October 9, 2001, a consular official met with five September 11 detainees at the MDC. Later that same day, the consular official tried to call the MDC Warden to discuss the detainees' cases, but was informed by an MDC employee that none of the five detainees was held at the MDC. Instead, the MDC employee gave the consular official the telephone number for BOP's National Inmate Locator, which, as discussed previously, did not contain information about the September 11 detainees.

Our review of files maintained by the Warden's Executive Assistant shows that between October 1, 2001, and May 7, 2002, the MDC received 22 requests for visits from 9 consulates regarding 24 different detainees. In addition, the Pakistani consulate made two requests to meet all Pakistani detainees housed at the MDC. Most of the correspondence in the file is annotated to indicate that a consular visit was approved or actually occurred. The exceptions were an October 24, 2001, request to visit five detainees, and a December 6, 2001, letter requesting visits with two detainees. We were unable to determine whether these consular visits took place because the letters are not annotated and the MDC did not maintain a separate list that reflected consular visits with September 11 detainees.

The MDC was not required to affirmatively notify foreign consulates that it was detaining citizens from their countries who had been arrested in connection with the September 11 terrorism investigation. BOP policy mandated only that MDC officials "permit" visits by consular officials. The overwhelming majority of September 11 detainees were nationals of Pakistan, India, Egypt, and Saudi Arabia. The international treaties that the United States has with these countries do not require mandatory notification of the consulate when a foreign national of those countries is held in U.S. detention.

Our review of the 22 visitation requests from consulates received by the MDC from October 2001 to early May 2002 showed that only 2 of the requests were from a country (United Kingdom) that, by treaty, requires affirmative notification. While we did not determine if the INS affirmatively notified United Kingdom consular officials of these two detentions, we found that these two detainees were visited by consular officials from the United Kingdom and the MDC complied with BOP policies in facilitating consular visits for these two detainees.

VI. ALLEGATIONS OF PHYSICAL AND VERBAL ABUSE

Based on our interviews of 19 September 11 detainees and our investigation of allegations of abuse raised by several detainees, we believe the evidence indicates a pattern of physical and verbal abuse against some September 11 detainees held at the MDC by some correctional officers, particularly during the first months after the terrorist attacks. Although the

allegations have been declined for criminal prosecution, the OIG is continuing to investigate these matters administratively.[121]

In this section of the report, we describe our interviews of 19 September 11 detainees during our inspection visit in May 2002, the investigation conducted by the OIG's Investigations Division regarding specific complaints of abuse, and other allegations of abuse that were referred to the FBI or BOP for investigation.

A. OIG Site Visit

In connection with this review of the treatment of September 11 detainees, our inspection team interviewed 19 detainees who were being held at the MDC when we visited the facility in May 2002. All 19 detainees complained of some form of abuse. Twelve complained about physical abuse and 10 complained about verbal abuse. The complaints of physical abuse ranged from painfully tight handcuffs to allegations they were slammed against the wall by MDC staff. The detainees told us that the physical abuse usually occurred upon their arrival at the MDC, while being moved to and from their cells, or when the hand-held surveillance camera was turned off.

Ten of the 19 detainees we interviewed during our inspection visit alleged they had been subjected to verbal abuse by MDC staff, consisting of slurs and threats. According to detainees, the verbal abuse included taunts such as "Bin Laden Junior" or threats such as "you're going to die here," "you're never going to get out of here," and "you will be here for 20-25 years like the Cuban people." They said most of the verbal abuse occurred during intake and during movement to and from the detainees' cells.

Our inspection team interviewed 12 correctional officers about the detainees' allegations of physical abuse. All 12 officers denied witnessing or committing any acts of abuse. Further, they denied knowledge of any rumors about allegations of abuse. The correctional officers we interviewed also denied they verbally abused the detainees and denied making these specific comments to the detainees.

[121] The OIG can pursue a complaint either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, for a variety of reasons, may not result in prosecution. When this occurs, the OIG can continue the investigation and treat the matter as a case for potential administrative action. The standard of proof to prove allegations in an administrative case is less than the "beyond a reasonable doubt" standard in a criminal case.

B. OIG Investigation of Abuse

On October 30, 2001, the OIG reviewed a newspaper article in which a September 11 detainee alleged he was physically abused when he arrived at the MDC on October 4, 2001. Based on the allegations in the article, the OIG's Investigations Division initiated an investigation into the matter. When we interviewed the detainee, he complained that MDC officers repeatedly slammed him against walls while twisting his arm behind his back. He also alleged officers dragged him by his handcuffed arms and frequently stepped on the chain between his ankle cuffs. The detainee stated his ankles and wrists were injured as a result of the officers' abuse. He also identified three other September 11 detainees who allegedly had been abused by MDC staff members.

We interviewed these three other September 11 detainees. They stated that when they arrived at the MDC, they were forcefully pulled out of the vehicle and slammed against walls. One detainee further alleged that his handcuffs were painfully tight around his wrists and that MDC officers repeatedly stepped on the chain between his ankle cuffs. Another detainee alleged officers dragged him by his handcuffs and twisted his wrist every time they moved him. All three detainees alleged that officers verbally abused them with racial slurs and threats like "you will feel pain" and "someone thinks you have something to do with the World Trade Center so don't expect to be treated well."

During our investigation of these complaints, we received similar allegations from other September 11 detainees. On February 11, 2002, four September 11 detainees held at the MDC (including one of the detainees we interviewed previously) told MDC officers that certain MDC officers were physically and verbally abusing them. Those complaints were provided to us. In interviews with our investigators, these detainees alleged that when they arrived at the MDC in September and October 2001, MDC officers forcefully pulled them from the car, slammed them into walls, dragged them by their arms, stepped on the chain between their ankle cuffs, verbally abused them, and twisted their arms, hands, wrists, and fingers. One of the detainees alleged that when he was being taken to the MDC's medical department following a 4-day hunger strike, an officer bent his finger back until it touched his wrist. Another detainee alleged that when he arrived at the MDC, officers repeatedly twisted his arm, which was in a cast, and finger, which was healing from a recent operation. He also alleged that when he was transferred to another cell in December 2001, officers slammed him into a wall and twisted

his wrist.[122] One detainee claimed his chin was cut open and he had to receive stitches because officers slammed him against a wall.

During our investigation, the OIG asked the detainees individually to identify the officers who had committed the abuse through photographic lineups. The detainees identified many of the same officers as the perpetrators, and the OIG focused its investigation on eight officers. The OIG interviewed seven of these officers. Six of them denied physically or verbally abusing any of the detainees or witnessing any other officer abuse the detainees. Five remembered at least one of the detainees and some of them remembered a few of the detainees. Two officers described two detainees as disruptive and uncooperative. One of the officers explained that the high-security procedures in place during the weeks following the September 11 attacks required four officers to physically control inmates during all escorts; face them toward the wall while waiting for doors, elevators, or the application and removal of leg restraints; and place them against the wall if they became aggressive during these escorts.

The seventh officer interviewed by the OIG told us that he witnessed officers "slam" inmates against walls and stated this was a common practice before the MDC began videotaping the detainees. He said he did not believe these actions were warranted. He said he told MDC officers to "ease up" and not to be so aggressive when escorting detainees. He also said he witnessed a supervising officer slam detainees against walls, but when he spoke with the officer about this practice the officer told him it was all part of being in jail and not to worry about it. The seventh officer signed a sworn affidavit to this effect. In a subsequent interview with the OIG, this officer recharacterized the action as "placing" the detainees against the wall, and said he did not want to use the word "slam." He denied that the officers acted in an abusive or inappropriate manner.

[122] This detainee alleged that while being transferred to another cell in the MDC in December 2001, two officers threw him against his cell wall, twisted his wrist, and placed him in the cell naked and without a blanket. The detainee claimed the officers physically abused him because he refused to clean his cell prior to the transfer. He claimed the officers' abuse left a scar on his wrist. The case was referred to the BOP, which interviewed the detainee, reviewed his medical records, and had the detainee's wrist examined. The MDC medical department did not find a scar on the detainee's wrist. The BOP also interviewed two officers alleged to have committed the abuse and a supervising officer who witnessed the detainee's transfer. All three stated that during a routine cell rotation the detainee began cursing and threatening the officers. One officer filed an incident report describing what he characterized as the detainee's insolent and threatening behavior. The three officers also stated that they did not throw the detainee against the wall, twist his wrist, or place him in a cell naked and without a blanket.

The OIG reviewed the detainees' medical records. The medical records do not indicate that most of the detainees received medical treatment for the injuries they asserted they received from officers. Two of the detainees' medical records indicate they were treated for injuries that they later claimed were caused by officers, but the medical records did not indicate that they alleged their injuries were caused by officers at the time they were treated. One detainee's records do not mention the cause of the injury and the other detainee's records state the detainee said he was injured when he fell. In his interview with the OIG, the detainee alleged his chin was badly cut when detention officers slammed him against the wall. He said that nobody ever asked him how his injury occurred. The other five detainees did not seek treatment for their alleged injuries.

Based on the scarcity of medical records documenting injuries and the lack of evidence of serious injuries to most of the detainees, the U.S. Attorney's Office for the Eastern District of New York and the Civil Rights Division declined criminal prosecution in this case. All of the detainees, with the exception of one, now have been removed from the United States. Nevertheless, the OIG is continuing its investigation of these allegations as an administrative matter. Because this case is ongoing, we are not describing in detail all the evidence in the case about the detainees' allegations. However, we believe there is evidence supporting the detainees' claims of abuse, including the fact that similar – although not identical – allegations of abuse have been raised by other detainees, which we describe in the next section.

C. FBI and BOP Investigations of Abuse

Four cases alleging physical abuse of September 11 detainees at the MDC were referred to the FBI for investigation. Another two complaints of abuse were referred to the BOP's internal affairs office for review. As we summarize below, the FBI closed three of these cases and one FBI case remains open. The BOP closed one case due to the resignation of an employee and closed the other as unsubstantiated after conducting an investigation.

In each of the four cases assigned to the FBI, the detainee alleged that he was "slammed" against a wall or door by MDC correctional officers and was injured as a result. Two of the detainees also alleged that they were threatened by MDC correctional officers and incurred additional physical abuse, such as being kicked by officers or having the chain on their leg restraints stepped on by officers. The detainees' complaints were forwarded initially to the Department's Civil Rights Division, which after a delay in two of the cases assigned them to the FBI to investigate. In two of the cases sent to the FBI, the detainees already had been removed by the time the FBI received the complaints and were not interviewed. In another case, the detainee was removed six months after the FBI received the case, but was not interviewed. The FBI did not attempt to locate these removed detainees or to interview the

correctional officers. The Civil Rights Division declined prosecution of the three cases, and the FBI subsequently closed its investigations.

In the one case that the FBI has not yet closed, the detainee complained in May 2002 that he was slammed into a wall, unnecessarily strip searched, and physically abused by MDC officers. The FBI received the case in July 2002, and opened an investigation in September 2002. As of March 19, 2003, however, the FBI had not interviewed the detainee or any officers.

In one of the cases referred to the BOP, the correctional officer who allegedly physically and verbally abused the detainee resigned during the investigation, and as a result the BOP closed the matter without further investigation. In the other case, the BOP interviewed the detainee, reviewed his medical records, and had his alleged injuries medically examined. The medical department did not find any injuries and the detainee's medical records do not indicate any injuries around the time of the alleged abuse. The BOP also interviewed two subjects and a supervising officer who witnessed the detainee's transfer. All three officers denied abusing the detainee and stated that during a routine cell rotation, the detainee began cursing and threatening the subjects. The BOP closed its investigation as unsubstantiated.

Based on the similarity of the allegations in these FBI and BOP cases to the ongoing OIG investigation, the OIG has decided to complete the investigations of the FBI and BOP cases and incorporate the relevant allegations from these cases into our ongoing investigation.

D. Allegations of Harassment

All 19 detainees we interviewed also complained of other types of harassing behavior by MDC staff while they were housed in the ADMAX SHU, such as staff banging on their cell doors or telling detainees to "shut up" while they were praying. All 19 detainees told the OIG that MDC officers banged on their cell doors for the midnight inmate count. When we questioned MDC staff about these allegations, they told us that they were responsible for ensuring that the detainees were alive during the nightly count and that banging on the cell doors was their method of waking the detainees. We confirmed that, according to BOP Program Statement 5511.06, Inmate Accountability, "Staff conducting counts shall ensure the observance of a real person and not a 'dummy.' When conducting a count, the staff member must personally observe a living breathing human body for each inmate counted." MDC staff told us they banged on the cell door to satisfy the BOP's national policy requirement to ensure that a living human body was in each ADMAX SHU cell.[123]

[123] BOP national policy requires inmate stand-up counts at least five times per day but specifies times for only two of the counts – 4:00 p.m. daily and 10 a.m. on weekends and (cont'd)

September 11 detainees also told the OIG that their afternoon prayers often were interrupted by MDC officers who conducted a "stand-up count" at 4:00 p.m. daily in the ADMAX SHU. MDC officials said the detainees were informed about these daily counts, including the midnight count, in a 2-page document containing ADMAX SHU policies that each detainee was supposed to receive when he first entered the MDC. However, several detainees told the OIG that they did not sufficiently understand English or they did not realize they were supposed to stop praying for the count. Two September 11 detainees said they were disciplined for not standing up during the count by being deprived of social visits. According to MDC records, one detainee had his social visitation privileges suspended for 60 days, while another detainee had his privileges suspended for 90 days.

When we questioned MDC staff on this subject, one Lieutenant said he delayed the afternoon count until the detainees had completed their prayers. All the other Lieutenants and correctional officers we interviewed said they followed standard BOP regulations and did not delay the afternoon count to avoid interfering with detainees' prayers.

E. Reporting Allegations of Abuse

Even though the MDC has a formal process for inmates to file complaints of abuse, we found that MDC staff failed to inform the September 11 detainees about these procedures in a timely manner. As discussed previously, the Administrative Remedy Program (ARP) is the BOP's formal procedure for filing allegations of physical or verbal abuse against facility staff. While the ARP is discussed in the MDC's facility handbook, only 1 of the 19 detainees we interviewed said he received this handbook when he arrived at the MDC in October 2001. The other 18 detainees we interviewed told us that they did not learn about this complaint resolution process until they received their facility handbooks several months after their arrival at the MDC.[124]

Of the 19 detainees we interviewed, 5 who said they never received facility handbooks told the OIG that they only learned about the ARP from

holidays. The BOP's practice is to conduct at least one of the other counts sometime during the hours of darkness.

[124] During intake screening at BOP facilities, a facility handbook normally is provided to the inmate and prison staff annotates the inmate's intake form to reflect that the inmate has received the handbook. When we examined the intake forms for the 19 September 11 detainees we interviewed, all forms were annotated to reflect that each detainee had received a handbook, which suggested that the handbook was given to the inmate but was quickly confiscated because it was on the list of forbidden items.

other detainees in the ADMAX SHU. Ten detainees said they received a handbook four to six months after arriving at the MDC, while three other detainees said they received a handbook within a month of arriving at the MDC.[125] One detainee did not respond to the question about when he received a facility handbook.

All 19 detainees told the OIG that they either were informed verbally about ADMAX SHU policies or they received a 2-page explanation of the policies instead of the complete MDC facility handbook. We found, however, that this 2-page summary of MDC policies did not include a description of the ARP process.

The Associate Warden for Programs told the OIG that all September 11 detainees were provided with a handbook when they were processed into the MDC. She suggested that it was possible that correctional officers confiscated the handbook from the detainees as an unacceptable item in their ADMAX SHU cell. The two-page document, "Special Housing Unit Rules and Regulations," included a list of items that the detainees could retain in their ADMAX SHU cells. These items included certain clothing items, facility-provided linen, specified personal items, and select hygiene items. The list of permitted items did not include a facility handbook. Therefore, according to the Associate Warden for Programs, because the facility handbook was not on the list, correctional officers may have confiscated the handbook. On October 17, 2001, the MDC changed its policy to permit detainees to retain the facility handbook in their cells. MDC officials could not explain why the detainees said that they did not receive the facility handbooks until months later. The Associate Warden also stated that some detainees might not have become familiar with the ARP process until several months after they arrived at the MDC because they did not understand English or had not read the handbook.

F. MDC Videotapes

MDC management took some affirmative steps to prevent potential staff abuse by installing security cameras in each September 11 detainee's cell in the ADMAX SHU and by requiring MDC staff to videotape all movements of detainees to and from their cells. However, the MDC's policy that permitted staff to destroy or reuse these videotapes after 30 days hindered these efforts. As a result, the OIG, MDC management, and others were unable to use the videotapes to prove or disprove allegations of abuse raised by individual detainees.

[125] One of these three detainees said he did not receive a handbook until he was released into the MDC's general population in May 2002.

According to interviews with BOP staff, the MDC installed cameras in its ADMAX SHU cells by mid-October 2001 pursuant to a national directive issued shortly after the September 11 attacks.[126] The directive required that cameras be installed in each cell housing a September 11 detainee. According to BOP and MDC officials, the security cameras were installed because the video record could help protect BOP staff from unfounded allegations of abuse. According to an "al Qaeda Training Manual" found by police in Manchester, England, during a search of an al Qaeda member's home, terrorists incarcerated in the United States were urged to distract Government officials by claiming mistreatment. Consequently, the BOP was concerned that specious allegations of abuse would consume valuable administrative and legal resources.

David Rardin, the former BOP Northeast Region Director, directed in an October 9, 2001, memorandum to Northeast Region Wardens (including the MDC) that any movement of a September 11 detainee outside of his cell must be videotaped. According to Rardin's memorandum, the videotape policy was intended to deter unfounded allegations of abuse made by September 11 detainees and to substantiate abuse if it occurred.

Rardin also directed that these videotapes of detainee movements and tapes of detainees in their cells were to be preserved "indefinitely." However, by December 18, 2001, after the MDC had accumulated hundreds of videotapes, Mickey Ray, Rardin's successor as the BOP's Northeast Region Director, revised the policy for retaining surveillance videotapes from "indefinitely" to 30 days, except for incidents involving use of force by BOP staff. According to instructions from Ray, tapes that showed use of force by MDC staff against detainees were to be preserved for "evidentiary use." Tapes that did not show use of force against detainees could be reused on the 31st day. Acting on Ray's new policy, MDC Warden Zenk and the MDC Captain told the OIG that correctional staff destroyed hundreds of tapes to free up storage space at the MDC.

Consequently, videotapes that could have helped prove or disprove allegations of abuse raised by detainees were not available. The lack of videotape evidence hampered the OIG's investigation of detainee abuse complaints.

[126] This policy was communicated by BOP Assistant Director Michael Cooksey to all BOP Regional Directors in a series of video conference calls that occurred between September 13 and September 20, 2001.

VII. OTHER ISSUES

A. Medical Care

We were unable to assess fully the level or quality of medical care provided to the September 11 detainees based on the limited documentation in the detainees' medical files.[127] Four September 11 detainees we interviewed complained that MDC medical staff provided them with over-the-counter pain relievers for every medical problem they raised, including toothaches and pain from kidney stones. The detainees alleged that they were not offered more effective treatments for their medical conditions.

One detainee told the OIG that he was given Tylenol for a sore throat but was given nothing for an elevated temperature associated with the flu. Another detainee, who fractured his hand prior to arriving at the MDC and had his cast removed the day before he arrived, claimed he received no treatment after informing MDC medical staff that he was in pain. When the detainee's hand was x-rayed in January 2002, the MDC physician's assistant allegedly told him that while the x-ray showed cracks in his hand, "we are not going to do anything about it." His MDC medical record showed that an x-ray was taken but the accompanying notes in the file were illegible. When questioned by the OIG, the physician's assistant said she did not recall making that statement to the detainee.

When we asked the same physician's assistant whether Tylenol was the only pain relief medication offered to the detainees, she responded that the MDC's normal practice was to provide medications that are sufficient to relieve pain and discomfort. We interpreted this statement to mean that from the physician assistant's perspective, Tylenol was sufficient to treat most discomfort. The physician's assistant said she dispensed Tylenol to the detainee who claimed he was not treated for his hand discomfort.

In keeping with the high-security procedures implemented by the MDC for moving September 11 detainees housed in the ADMAX SHU, a detainee's visit to the MDC medical or dental offices required removal of all other non-ADMAX SHU inmates from the offices before medical or dental staff could

[127] An MDC physician's assistant interviewed by the OIG in May 2002 initially said that September 11 detainees were not entitled to the same medical or dental care as convicted federal inmates. However, in a January 2003 follow-up interview, the physician's assistant denied making those statements to the OIG, and instead asserted that pretrial inmates are entitled to the same health care as any other inmates in BOP custody. According to BOP Program Statement 7331.03 on Pretrial Inmates, "staff shall provide the pretrial inmate with the same level of basic medical (including dental), psychiatric, and psychological care provided to convicted inmates."

conduct diagnostic procedures such as x-rays. The MDC's escort requirement for September 11 detainees was unique among MDC inmates and, according to the physician's assistant, resulted in delayed medical or dental care for the detainees. For example, the physician's assistant told the OIG about a 4-week delay in x-raying a detainee because of the manpower-intensive escort requirement. However, she speculated that other reasons also might have delayed a detainee's diagnostic procedure, including an unexpected attorney visit. The physician's assistant could not recall how many detainees were affected by such delays for diagnostic services, except that the number was small.

Interviews with September 11 detainees and MDC records confirmed that medical staff made daily rounds in the ADMAX SHU. Beyond that, however, incomplete documentation in the facility's medical files made it impossible for us to draw conclusions about the quality of medical and dental care provided by MDC staff to September 11 detainees.

B. Recreation

MDC staff provided the limited amount of recreation for September 11 detainees required by BOP policy for high-security inmates. However, the large number of detainees housed in the ADMAX SHU, the lack of warm clothing, and scheduling conflicts restricted the detainees' willingness or ability to participate in exercise.

According to BOP policy, ADMAX SHU detainees are entitled to one hour of recreation a day, five days a week. MDC staff documented the ADMAX SHU record each time they offered recreation to September 11 detainees and also noted any refusals by a detainee to participate in recreation.

September 11 detainees told the OIG that lack of proper clothing was a major reason why they often refused recreation. According to all 19 detainees we interviewed, during November and December 2001 the short-sleeved shirts they were provided offered insufficient protection from the cold in the recreation areas in the ADMAX SHU, which were located on the top floor of the MDC and were open-air.

Three detainees told the OIG that in January 2002, MDC staff began offering jackets to detainees who wanted to exercise. According to 18 ADMAX SHU reports we reviewed covering a period from November 9, 2001, to January 8, 2002, almost 75 percent of the detainees held at any one time in the ADMAX SHU declined recreation because it was regularly offered in the early morning when conditions were too cold.

C. Lighting in the ADMAX SHU

Eighteen of the 19 detainees we interviewed told the OIG that lights in their cells were illuminated at all times, even at night. MDC management told the OIG that these lights were necessary to properly operate the security cameras installed in each of the detainees' cells. In addition, MDC management claimed that it did not have the ability to reduce the amount of light in the detainees' cells due to the manner in which the cellblock's wiring was configured. However, we found that MDC staff was able to reduce the amount of light in individual detainee cells as early as November 2001, but chose to keep the cell lights on 24 hours a day until at least late February 2002.

In mid-October 2001, the MDC installed security cameras in each ADMAX SHU cell. According to Warden Zenk, each cell had to be illuminated sufficiently to provide for effective operation of the cameras. Each ADMAX SHU cell at the MDC has two lights: a small, square "nightlight" immediately inside the cell entrance, and a larger, rectangular "main light" in an upper corner of the cell. The nightlight, which is flush with the cell wall, is significantly dimmer than the cell's larger main light. A single switch located in a secure area at the end of the range controlled the two lights in all ADMAX SHU cells. While BOP policy provides that ADMAX SHU cells should be "adequately lighted," it does not specify the magnitude of lighting or hours of the day when lights should be turned on or off.

Eleven of the 19 detainees we interviewed said both lights in their ADMAX SHU cells were illuminated 24 hours a day until late March or early April 2002. Two detainees told the OIG that the main light in their cells was turned off in the evenings beginning in late February 2002. The other six detainees we spoke with could not specify the date the main cell lights were first turned off at night. A Lieutenant assigned to the ADMAX SHU during this period told the OIG that while he was unsure of the date, he remembered that detainees in the ADMAX SHU cells cheered when the main lights were first turned off in the evening.

All 19 detainees we interviewed complained about the difficulty of sleeping with both lights illuminated at all times in their ADMAX SHU cells. Detainees who were transferred to MDC's general population – which did not follow the same cell lighting protocols as the ADMAX SHU – told the OIG they were relieved to have the cell lights turned off during the evenings. The detainees told the OIG that the constant lighting in their ADMAX SHU cells affected them in the following ways: lack of sleep, exhaustion, depression, stress, acute weight loss, fevers, panic attacks, rapid heart beat, and reduced eyesight. In addition, according to a November 27, 2001, ADMAX SHU report,

a September 11 detainee at the MDC whom we did not interview requested to see the MDC psychologist because he claimed he was suffering from sleep deprivation "after several months with the cell lights continuously illuminated."

When questioned about the issue, Warden Zenk and other MDC managers told the OIG that both lights in each detainee's ADMAX SHU cell were illuminated 24 hours a day until mid-March 2002. They said that at that time, installation of a new electrical circuit permitted staff to independently operate the two lights in the cells housing September 11 detainees. MDC staff said that after mid-March 2002 the main lights in detainees' cells were turned off from 11:00 p.m. until 6:00 a.m. on weekdays, and from 11:00 p.m. until 10:00 a.m. on weekends. They said that after mid-March 2002, only the smaller nightlight in each detainee's cell was illuminated 24 hours a day, and this was done to facilitate operation of the security cameras.

However, we found a wide discrepancy among MDC staff and other BOP officials as to the date the ADMAX SHU cells were rewired to permit independent operation of the nightlight and the main light. Our interviews with MDC and BOP staff found:

- The MDC facilities manager stated that the two sets of cell lights were rewired in late September or early October 2001, which allowed the main lights in the ADMAX SHU cells to be turned off independently from the nightlights;

- The MDC Associate Warden for Operations estimated that the lights were rewired between January and February 2002;[128]

- The MDC electrician who performed the work said he rewired the circuits for the lights sometime in October or November 2001. While uncertain of the exact date, he told the OIG that he was positive the date was in this 2-month range; and

- The BOP's Northeast Region detailed an employee to the MDC to assist with rewiring the lights in the ADMAX SHU cells and installing the security cameras. A Facilities Management Specialist from the Northeast Region Office told the OIG that he was detailed to the MDC from November 5-9, 2001, and assisted the MDC electrician in re-routing the lighting circuits in the ADMAX SHU cells so the two cell lights could be operated independently.

[128] A written work order was not used to authorize rewiring the switch that controls the lights in the ADMAX SHU cells. According to MDC management, the work order was conveyed verbally by the Associate Warden of Operations.

The MDC electrician stated that after detainees complained about both lights still being illuminated 24 hours a day, he checked the lights in January or February 2002 and found the rewiring he had performed in October or November 2001 was operating so that the larger main light in the cells could have been turned off separately from the smaller nightlight.

Warden Zenk responded to the OIG's findings that the main lights could have been turned off by the fall of 2001 by stating that MDC staff completed rewiring lights in the ADMAX SHU cells "by December 1, 2001." He said that at that point, the circuits for the lights were reconfigured for only two selections: either the nightlight could be turned on or the main light could be turned on, but not both lights simultaneously.

Warden Zenk further explained that while MDC management had originally told us that the two lights in the ADMAX SHU cells were illuminated 24 hours per day until "mid-March 2002," this date represented the time by which all SHU cells, including the second non-ADMAX SHU range that did not house September 11 detainees, were rewired to permit independent operation of the two lights. However, his response does not explain why 13 of the 19 September 11 detainees we interviewed stated that both lights in their cells were illuminated 24 hours a day until at least late February 2002.

We concluded that MDC staff had the capability to independently operate the lights in the detainees' ADMAX SHU cells by November 2001. We based our conclusion on interviews with September 11 detainees housed in the ADMAX SHU, BOP personnel from the Northeast Region Office, and staff at the MDC who either performed the rewiring or exercised direct oversight over the electrical work. While MDC management claimed that the facility did not have the ability to separately operate lights in detainees' ADMAX SHU cells until December 2001, the earliest date in which detainees said the main lights were turned off at night was late February 2002. Consequently, we concluded MDC staff subjected September 11 detainees to having both cell lights illuminated 24 hours a day for several months after they had the ability to independently control the lights.

D. Personal Hygiene Items

Five of the 19 September 11 detainees we interviewed stated that they were deprived of personal hygiene items. According to applicable BOP policies, the MDC should have provided each detainee with one fresh towel each week and should have allowed each detainee to have one bar of soap. Two detainees stated that they were not given towels or soap during their first month in the ADMAX SHU. One detainee complained that he was not allowed to keep a toothbrush, towel, or toilet paper in his cell. Another detainee stated that he did not regularly receive soap or toilet paper. The fifth detainee stated that he

did not have toilet paper in his cell during his first three weeks in the ADMAX SHU.

The MDC Captain in charge of the ADMAX SHU told us that the MDC policy for issuing hygiene supplies to September 11 detainees initially was established on September 21, 2001. According to this policy,

> The SHU Lieutenant will supervise issuance of hygiene supplies every day. The SHU Officers will ensure the inmate receives toilet paper, toothbrush, toothpaste, etc. The security toothbrush is the only authorized toothbrush for use on this unit. The hygiene supplies will be provided to the inmate and then retrieved by the officers a short time later [emphasis added].

The Captain said that correctional officers issued hygiene supplies to the detainees each day according to this policy. He confirmed that all hygiene supplies were removed after use. Further, he stated that detainees were not permitted to keep toilet paper in their cells. When asked about the detainees' complaints, the Captain expressed disbelief that detainees failed to receive personal hygiene items. The Captain said the policy was modified on October 15, 2001, by eliminating the sentence, "The hygiene supplies will be provided to the inmate and then retrieved by the officers a short time later."

E. Hunger Strikes

Seven of the 19 September 11 detainees we interviewed stated they participated in a hunger strike while housed in the ADMAX SHU as a protest against their incarceration and their conditions of confinement. The detainees told the OIG that they were just "immigration violators" and not drug dealers or criminals and that confinement in the ADMAX SHU was "excessive punishment."

According to BOP policy, an inmate must refuse nine consecutive meals before it considers the inmate to be on a hunger strike.[129] When a detainee or inmate refuses nine meals, facility medical staff is required to carefully monitor the individual by weighing them daily and checking blood sugar levels frequently.

The MDC provided us with 18 ADMAX SHU reports for information about September 11 detainees on hunger strikes. According to these reports, for a 3-day period beginning November 27, 2001, 20 out of 46 detainees in the ADMAX SHU declared themselves to be on a hunger strike. Among the reasons cited on the ADMAX SHU reports by the detainees for refusing meals were "left

[129] BOP Program Statement 5562.04, Inmate Hunger Strikes.

for over 60 days with no visits from INS or the FBI, uncertainty over their future, confinement in Special Housing instead of general population, and limited visits and telephone calls." By November 29, 2001, all of the detainees had ended their hunger strikes, according to the ADMAX SHU reports, after many of the detainees received visits from their attorneys.

Case Study 4:

A September 11 detainee arrived at the MDC on February 17, 2002, and began a hunger strike in late March 2002. According to the ADMAX SHU reports, the detainee began his hunger strike to protest his confinement in the ADMAX SHU instead of the MDC's general population and because of the MDC's limitation on visits and telephone calls. The detainee also was upset because he was not allowed to see his wife until she proved that she was married to him.

MDC staff began checking the detainee's blood sugar levels daily and offered him liquid nutritional supplements when he refused his ninth consecutive meal. By April 2, 2002, the detainee had missed a total of 17 consecutive meals. We could not determine how many more meals he missed because the next available ADMAX SHU report was dated April 6, 2002, and contained no mention of the continuing hunger strike. Therefore, we infer that the detainee ended his hunger strike sometime before April 6, 2002. The detainee told the OIG that he could not pinpoint the date he ended his hunger strike because he did not have access to a calendar.

VIII. OIG ANALYSIS

In the aftermath of the September 11 attacks, 184 aliens arrested on immigration charges were confined in high-security federal prisons, as opposed to less restrictive INS detention facilities. Eighty-four of these aliens were held at the MDC in Brooklyn, New York. These MDC detainees were held under "the most restrictive conditions possible," which included "lockdown" for at least 23 hours per day, extremely limited access to telephones, and restrictive escort procedures any time the detainees were moved outside their cells. To this end, the MDC created an ADMAX SHU specifically to confine the September 11 detainees.

The BOP played no role in deciding the security risk posed by individual September 11 detainees or their potential connections to terrorism. As discussed in Chapter 4, these decisions were made by the FBI in consultation with the U.S. Attorney's Office in the Southern District of New York and were communicated to the INS, whose agents generally arrested the aliens as part of a Joint Terrorism Task Force effort.

However, once the FBI characterized a detainee as "high interest" and the INS transferred the detainee to BOP rather than INS custody, the BOP took responsibility for the detainee's confinement. In the heightened state of alert after the terrorist attacks, the BOP combined a series of existing policies and procedures that applied to inmates in other contexts and applied them to the detainees they received after September 11, such as designating September 11 detainees as WITSEC inmates.

As a threshold matter, we question the criteria (or lack thereof) the FBI used to make its initial designation of the potential danger posed by September 11 detainees. The arresting FBI agent usually made this assessment without any guidance and based on the initial detainee information available at the time of arrest. In addition, there was little consistency or precision to the process that resulted in detainees being labeled "high interest," "of interest," or "of undetermined interest." While many of these decisions needed to be made quickly and were based on less than complete information, we believe the FBI should have exercised more care in the classification process, given the significant ramifications on detainees' freedom of movement and association depending on whether they were confined in a high-security facility such as the MDC or a less restrictive facility such as Passaic (discussed in Chapter 8). More important, as discussed in Chapter 4, the FBI devoted insufficient resources to investigating or clearing most of these detainees, resulting in their prolonged confinement under extremely high security conditions. Even after clearance, the BOP's delay in notifying the MDC lengthened even further these detainees' stay in the ADMAX SHU.

With regard to the conditions of confinement for detainees at the MDC, we appreciate that the influx of high-security detainees stretched MDC resources to their limit, with MDC staff members often working double shifts to monitor the detainees during a highly emotional period of time. We also appreciate the uncertainty surrounding these detainees and the chaotic conditions in the immediate aftermath of the September 11 attacks. However, our review raises serious questions about the treatment of the September 11 detainees housed at the MDC in several regards.

First, BOP officials imposed a "communications blackout" specifically for September 11 detainees within a week of the terrorist attacks. During this blackout period, detainees were not permitted to receive any telephone calls, visitors, or mail, or to place any telephone calls or send mail. While we were unable to determine the exact length of this communications blackout, it appears to have lasted several weeks, after which time the September 11 detainees were permitted limited attorney and social contacts. During this time, attorneys and family members were unable to receive any information about these detainees, including where they were being held. While such a policy was within the BOP's discretion, we question the justification for a total

communications blackout on all these individuals, particularly for the length of time that it was imposed. In addition, the telephone limitations imposed on this group of detainees – one legal telephone call per week and one social call per month – further hindered the detainees' ability to obtain legal assistance, which posed a significant problem since the majority of the detainees entered the MDC without counsel.

Second, as noted above, the BOP initially designated all September 11 detainees as WITSEC inmates. Usually, this designation is applied to individuals who agree to cooperate with law enforcement by providing testimony against criminal suspects. Application of this WITSEC classification to the September 11 detainees, however, resulted in MDC officials continuing to withhold information about the detainees' location, even after the communications blackout was lifted.

This classification frustrated efforts by the detainees' attorneys, family members, and even law enforcement officers to determine where the detainees were being held. Because information on WITSEC inmates is tightly restricted, even MDC staff working at the front desk in the facility's lobby did not have access to information about the September 11 detainees. We found that MDC staff frequently – and mistakenly – told people who inquired about a specific detainee that the detainee was not held at the facility when, in fact, the opposite was true. Instead, the staff referred the caller or visitor to the BOP's Inmate Locator system for information about where an individual detainee was being held. But WITSEC inmates are not listed in this public system because of security reasons, and this prevented attorneys or family members from locating these September 11 detainees. We fault the MDC for not considering in a more timely manner the implications of labeling these September 11 detainees as WITSEC detainees and for not properly communicating to its employees – especially its staff who worked the facility's front desk – about the classification issues affecting September 11 detainees and how to properly address inquiries from the public.

The BOP tried at least twice to address this situation by reclassifying the September 11 detainees, first by renaming them "Group 155" inmates. Even then we found the BOP continued to use "WITSEC" as its primary designation. On October 31, 2001, the BOP reclassified the detainees as "Special SIS Cases." Neither reclassification alleviated the access issues confronted by detainees' attorneys and family members. In fact, we found that as late as March 1, 2002 – more than six months after the first September 11 detainees arrived at the MDC – the BOP's initial decision to classify the detainees as WITSEC inmates continued to cause confusion and resulted in attorneys being told incorrectly that their clients were not being held at the MDC.

We understand the MDC's efforts to follow instructions from BOP Headquarters and confine the September 11 detainees under secure

conditions. That said, the detainees were pretrial inmates, most of whom had not obtained legal representation by the time they were confined at the MDC. Consequently, their designation by BOP officials as WITSEC inmates hindered the detainees' efforts to contact legal counsel and their families. We also believe the BOP should have taken timelier and more effective steps to address the situation after it realized the impact this designation was having on the September 11 detainees and the ability of their attorneys and families to locate them.

Third, with regard to the policies within the MDC for confining the September 11 detainees, MDC officials used existing BOP policies applicable to inmates in disciplinary segregation, and confined the September 11 detainees in the ADMAX SHU. The detainees were placed in restraints whenever they were outside their cells, including handcuffs, leg irons, and heavy chains. Four staff members were required to be present each time a detainee was placed into restraints and escorted from a cell. The detainees also were required to remain in restraints during their non-contact visits with their attorneys or family members.

Because of these restrictive conditions, we believe it was important for the FBI, INS, and BOP to determine, in a reasonable time frame, whether these detainees were connected to terrorism or whether they could be cleared to be moved from the ADMAX SHU to the MDC's much less restrictive general population. Yet, detainees remained in the ADMAX SHU for a long period of time waiting for the FBI's clearance process which, as we described in Chapter 4, was excessively slow. Even when the FBI cleared the detainees, they remained in the ADMAX SHU for days and sometimes weeks longer than necessary due to delays between the time the FBI cleared a detainee of a connection to terrorism and the time the MDC received formal notification of the clearance. In addition, we found that the MDC did not consistently follow its established procedures. Without explanation, it released at least four September 11 detainees from the ADMAX SHU prior to receiving clearance from the FBI that the detainee had no links to terrorism.

Fourth, the restrictive conditions imposed by the MDC prevented the detainees from obtaining counsel in a timely fashion. The BOP has no national policy regulating the number or length of telephone calls that inmates in an ADMAX SHU can make to their attorneys. Consequently, the policy regulating the frequency and duration of legal telephone calls established by the MDC for September 11 detainees – while complying with very broad BOP national standards – severely limited the detainees' ability to obtain and consult with legal counsel.

As mentioned previously, most September 11 detainees did not have legal representation prior to their detention at the MDC (only 2 of the 19 detainees we interviewed had hired legal counsel before they entered the MDC).

The MDC imposed a policy that permitted September 11 detainees housed in the ADMAX SHU only one legal call per week. This type of policy is more appropriate for pre-trial inmates who have obtained counsel prior to their incarceration rather than for inmates like the September 11 detainees who needed to find counsel.

Further complicating the detainees' efforts to obtain counsel, the pro bono attorney lists provided September 11 detainees by the INS through EOIR contained inaccurate and outdated information. As a result, detainees often used their sole legal call during a week to try to contact one of the legal representatives on the pro bono list, only to find that the attorneys either had changed their telephone number or did not handle the particular type of immigration situation faced by the detainees. In addition, detainees complained that legal calls that resulted in a busy signal or calls answered by voicemail counted as their one legal call for that week. When questioned about this, MDC officials gave differing responses about whether or not reaching an answering machine counted as a completed legal call. We believe that counting calls that only reached a voicemail, resulted in a busy signal, or went to the wrong number was unduly restrictive and inappropriate.

In addition, the manner in which the MDC inquired whether the detainees wanted to place a legal call was unclear and inappropriate. In many instances, the unit counselor inquired whether September 11 detainees in the ADMAX SHU wanted their weekly legal call by asking, "are you okay?" For some period, several detainees told the OIG that they did not realize that an affirmative response to this rather casual question meant they opted to forgo their legal call for that week. We believe the BOP should have asked the detainees directly "do you want a legal telephone call this week?" rather than relying on the detainees to decipher that a shorthand statement "are you okay?" meant "do you want to place a legal telephone call?"

Our review determined that the MDC officials recognized their obligation to permit representatives from foreign consulates to visit with detainees and established a clearance procedure to facilitate these visits. However, we found that consular representatives experienced the same difficulties as attorneys in obtaining access to detainees due to the BOP's categorization of the detainees as WITSEC inmates. In addition, the MDC's classification of detainee calls to their consulates as "social calls" severely limited the detainees' ability to contact their consulates in a timely manner, given the MDC's limit of one social call per month for detainees.

Fifth, the restrictive BOP policies and the classification of September 11 detainees also hindered family visits. Although MDC management tried to train reception area staff on proper procedures for granting visitation to detainee family members, problems persisted even many months after September 11.

Sixth, with regard to allegations of physical and verbal abuse, we concluded that the evidence indicates a pattern of abuse by some correctional officers against some September 11 detainees, particularly during the first months after the attacks. Most detainees we interviewed at the MDC alleged that MDC staff physically abused them. Many also told us that that MDC staff verbally abused them with such taunts as "Bin Laden Junior" or with threats such as "you will be here for the next 20-25 years like the Cuban people." Although most correctional officers denied such physical or verbal abuse, the OIG's ongoing investigation of complaints of physical abuse developed significant evidence that it had occurred, particularly during intake and movement of prisoners.[130]

Seventh, MDC staff failed to inform detainees in a timely manner about the process for filing complaints about their treatment. Only 1 of the 19 detainees we interviewed said he received a facility handbook when he arrived that described the formal complaint process. Ten detainees told the OIG they did not learn about the complaint resolution process until they received their facility handbook 4 to 6 months after arriving at the MDC.

The Associate Warden for Programs told the OIG that all September 11 detainees received a facility handbook when they were processed into the MDC. Yet, even if the detainees received handbooks, staff apparently confiscated them as unacceptable items to retain in their ADMAX SHU cells. In addition, we found that a 2-page summary of MDC policies distributed to many of the detainees did not contain information about how to file a formal complaint. The haphazard fashion in which MDC staff handled dissemination of the facility handbook impeded the detainees' ability to seek review for their complaints about conditions of confinement at the MDC. If the detainees were not permitted to keep the facility handbook in their cells for security reasons, the MDC's 2-page summary of facility policies should have included information that described the process for filing a formal complaint.

Eighth, MDC staff appropriately took affirmative steps to prevent potential staff abuse against September 11 detainees – and protect MDC staff from unfounded allegations of abuse – by installing security cameras in each detainee's cell and by requiring staff to videotape all detainee movements outside their ADMAX SHU cells. However, the BOP's decision to permit MDC staff to destroy or reuse these videotapes after 30 days hampered the usefulness of the videotape system to prove or disprove allegations of abuse raised by individual detainees. We understand the difficulty in storing the

[130] To date, our investigation has not uncovered any evidence that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it. However, our investigation is still ongoing.

hundreds of videotapes the MDC accumulated after several months of taping the detainees. But the decision to recycle or destroy the videotapes created problems regarding allegations of physical abuse at the MDC. Detainees were unable to use videotape evidence to support allegations of abuse filed more than 30 days after an alleged incident. Similarly, MDC staff had more difficulty refuting abuse allegations raised by detainees if the complaint was filed more than 30 days after the incident.

Given the proactive steps taken to prevent or document incidents of physical abuse against September 11 detainees, we believe rescinding the videotape retention policy was unwise. If BOP and MDC management wanted to refute detainee allegations of abuse using videotape evidence, it was shortsighted on their part to assume that all such allegations would be made and resolved within 30 days.

Ninth, we found that recreation offered to the September 11 detainees was limited due to BOP security policies, the limited number of recreation cells within the ADMAX SHU, and lack of proper clothing that led detainees to regularly refuse recreation because it was offered most often in the early morning hours when it was colder in the open-air recreation cells.

Tenth, MDC staff subjected the September 11 detainees to having both lights illuminated in their cells 24 hours a day for several months longer than necessary, even after electricians rewired the ADMAX SHU range. Our review determined that, despite the initial representations to us by MDC officials, the MDC was able to reduce the amount of light in an individual detainee's cell as early as November 2001, but instead kept both cell lights illuminated until at least mid-March 2002. Eighteen of the 19 detainees we interviewed complained to the OIG about the difficulty of sleeping with both lights illuminated 24 hours a day, citing exhaustion, depression, stress, and sleep deprivation. The MDC had little reason for keeping the lights constantly illuminated for as long as it did.

In sum, we recognize the uncertainties and confusion surrounding the initial policies and treatment relating to these September 11 detainees. Much about these detainees was unknown, and the BOP had to accept the FBI's loosely applied assessment of these detainees as "of interest" to the terrorism investigation. However, while we fault the FBI for the slowness of the clearance process, we believe the blackout and the initial WITSEC designation that the BOP imposed for several weeks was excessive, particularly because many of these detainees had no counsel or any contact with families. We also believe that the BOP instituted excessively restrictive policies on the detainees, particularly regarding telephone privileges. In addition, the BOP did not provide adequate information about the location of the detainees to the detainees' attorneys or their family members. These policies hindered the detainees' ability to obtain and consult with legal counsel and were more

appropriate for detainees who had attorneys prior to arriving at the MDC. We also believe that some of the detainees were subject to physical or verbal abuse. Finally, we believe that some of the conditions of confinement were unnecessarily severe, such as two lights constantly illuminated in the detainees' cells. While the chaotic situation and the uncertainties surrounding the detainees' role in the September 11 attacks and the potential for additional terrorism explain some of these problems, they do not explain or justify all of them. We believe that the Department and the BOP should consider these issues carefully in an effort to avoid similar problems in the future.

CHAPTER EIGHT

CONDITIONS OF CONFINEMENT AT THE PASSAIC COUNTY JAIL IN PATERSON, NEW JERSEY

I. INTRODUCTION

Not all September 11 detainees were confined in highly restrictive facilities like the MDC. The majority of the aliens arrested on immigration charges after the September 11 terrorist attacks were not deemed by the FBI to be of "high interest" to its terrorism investigation and therefore were housed in INS detention facilities or state or county jails under contract to the INS to house federal immigration detainees.

The Passaic County Jail (Passaic), located in Paterson, New Jersey, approximately 25 miles from the INS Newark District Office, has been under contract with the INS since 1985 to house federal immigration detainees awaiting processing of their cases.[131] It also houses United States Marshals Service prisoners. The 4-story facility, built in 1956, houses inmates in both medium- and high-security settings and has a capacity of approximately 1,800 beds.

According to INS data, Passaic housed 400 September 11 detainees from the date of the terrorist attacks through May 30, 2002. This represented the most September 11 detainees held at any single U.S. detention facility. Passaic eventually housed 52 percent of all September 11 detainees (400 of 762).

Passaic's total inmate population was approximately 1,600 on September 11, 2001. As September 11 detainees began arriving at Passaic, the total inmate population grew to a peak in late November 2001 of about 1,750 inmates, but never reached the facility's capacity of 1,800. During the period September 2001 through May 2002, the population of non-INS inmates averaged approximately 1,440.

Unlike the MDC, Passaic had confined federal immigration detainees for more than 15 years, and the staff at Passaic was familiar with the INS and issues related to INS detainees. Also different from the MDC, September 11 detainees housed at Passaic were not identified as such by jail staff or segregated from the rest of the prison population. Passaic officials made no distinction between the detainees confined as a result of the September 11

[131] Two other contract facilities in the INS Newark District – the Hudson County Jail and the Middlesex County Jail – also housed September 11 detainees.

investigation and other INS detainees confined on "regular" immigration charges. Our interviews with September 11 detainees at Passaic confirmed that, while most stated that they did not understand why they were in jail, they were not singled out in any way for exceptional treatment by jail staff because they were or had been subjects of the September 11 terrorism investigation.

As discussed in Chapter 7, MDC officials were instructed by the BOP to treat the September 11 detainees as WITSEC inmates and hold them under very restrictive conditions. In contrast, the INS did not give Passaic specific classification instructions, and Passaic officials treated the September 11 detainees as regular INS detainees. Overall, September 11 detainees at Passaic were given considerably more privileges than detainees at the MDC and were not systematically subjected to the lockdown conditions or the restrictions on their freedom of movement or association experienced by detainees held at the MDC.

This chapter examines the conditions of confinement experienced by September 11 detainees housed at Passaic. As in the chapter on MDC, we address the detainees' housing conditions, access to legal counsel, attorney and social visitation, allegations of physical and verbal abuse, medical services, and opportunities for recreation. We also describe oversight of the Passaic detainees by the INS Newark District.

We developed a sample of 66 September 11 detainees housed at Passaic. The sample included 30 detainees held at Passaic as of April 2002 and 30 additional detainees who were released or transferred prior to April 2002. When we conducted our fieldwork at Passaic in May 2002, 13 of the 30 detainees identified as currently held at Passaic were still there. The other 17 had been released or transferred. We interviewed the 13 detainees who were still confined at Passaic. We also interviewed six detainees held at Passaic who were the subject of media articles, and reviewed files for all 66 detainees in our sample.

II. BACKGROUND ON PASSAIC COUNTY JAIL

The INS has entered into numerous Intergovernmental Service Agreements (IGAs) with county governments across the United States to house federal immigration detainees. Passaic signed an IGA with the INS in January 1985 to house INS detainees; Passaic currently receives $77 per day for each detainee it confines. The INS has developed standards that facilities such as Passaic must follow to be eligible for INS contracts and funding. These standards articulate policies on a wide variety of confinement issues, including detainee telephone access, medical care, and discipline.

The INS Newark District contracted with Passaic and other county facilities in northern New Jersey to hold INS detainees, and had oversight

responsibility for the September 11 detainees held at Passaic. In contrast, the INS New York District had no direct oversight of September 11 detainees confined at the MDC because the MDC is a federal prison operated by the BOP.

INS detainees were housed in the medium security portion of the Passaic County Jail. Within that part of the facility, a Special Detention Unit (SDU) of six single-person cells is used when needed to segregate inmates either for their own protection or to punish inmates who commit disciplinary infractions. Inmates confined to the SDU are monitored 24 hours per day by cameras in each cell. In addition, SDU inmates only are permitted to place calls to and receive visits from their attorneys – no social calls or visits are allowed. According to Passaic policy, disciplinary infractions such as assaulting or threatening staff and inmates are usually punishable by confinement in the SDU for 15 to 30 days per incident. Later in this chapter, we discuss the experiences of the few September 11 detainees held in the SDU.

In late April 2001, Edwin Englehardt, the Passaic County Sheriff for 28 years, resigned and then-Undersheriff Ron Fava was elevated to Acting Sheriff. Fava appointed Felix Garcia as Warden to run the Passaic jail. At the time of the terrorist attacks on September 11, 2001, Garcia had operational responsibility for Passaic. In January 2002, Jerry Speziale took office as Sheriff and appointed Charles Meyers as Warden of the Passaic jail.[132]

III. HOUSING OF DETAINEES

A. Processing of September 11 Detainees

Upon their arrival at Passaic, similar to other INS detainees, September 11 detainees were searched, fingerprinted, photographed, issued jail clothing, provided with the jail handbook, and placed in a temporary holding cell to await a medical examination and mental health screening by Passaic staff. Generally within 24 hours, the detainees were assigned to a housing unit in the facility.

The INS's Detention Standards provide general guidelines for classifying inmates based on various factors, including "current offense, past offenses, escapes, institutional disciplinary history, and violent episodes/incidents." The classification ranges from Level 1 (least serious) to Level 3 (most serious). Under these standards, INS detainees such as the September 11 detainees were classified as Level 1 inmates and could not be housed with Level 3 inmates who had been convicted of acts of physical violence or aggravated felonies such as narcotics trafficking. This stands in contrast with the BOP

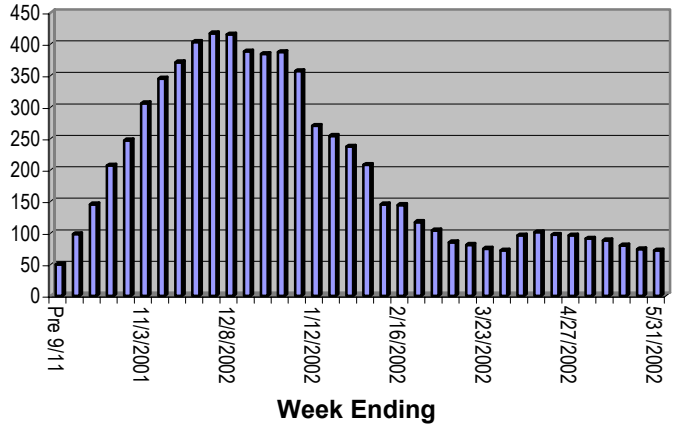
[132] Garcia was promoted to Undersheriff in January 2002, but subsequently left his position and was not on staff at the time of our site visit to Passaic in May 2002.

memorandum, "Guidance for Handling of Terrorist Inmates and Recent Detainees," issued on October 1, 2001, by Michael Cooksey, the BOP's Assistant Director for Correctional Programs, that placed the September 11 detainees held by the BOP under extremely restrictive conditions of confinement.

Some INS detainees at Passaic were assigned to a unit (pod) with 2-person cells and an associated dayroom, but more often to large dormitory units housing approximately 50 men. The dormitory units served as both sleeping quarters and a dayroom. INS detainees, including September 11 detainees, had most of the same privileges and restrictions as other inmates at the facility, with the exception that jail policy forbade INS detainees from holding jobs in the jail. Beginning in September 2002, however, INS detainees were able to work in the Passaic laundry facility.

According to INS data, 92 percent of the September 11 detainees held at Passaic (371 of the 400) were arrested in the New York City area. Based on data from the INS and Passaic, the average number of total INS detainees housed at Passaic per week climbed steadily, from about 50 detainees out of a total of 1,596 inmates at the facility prior to September 11, 2001, to 98 by October 6, 2001. The number of INS detainees continued to climb, to 207 on October 20, 2001, to 306 on November 3, 2001, to a high of 417 (out of a total population of 1,777) by early December 2001. During this 3-month period, the number of INS detainees at Passaic increased from 3 percent to 23 percent of the facility's total inmate population. In spite of the dramatic increase in INS detainees, the facility never reached overcrowded conditions because Passaic had a significant number of empty beds prior to September 11.

Figure 11
Weekly Average Number of INS Detainees Held at Passaic County Jail



The steady increase in INS detainees over such a relatively short period of time reduced Passaic's ability to consistently ensure INS detainees were segregated from more serious offenders. Passaic Warden Meyers and Deputy Warden Brian Bendl told the OIG that due to the sudden influx of INS detainees after September 11, detainees were housed alongside sentenced county inmates. Bendl said this happened when Passaic did not have sufficient immigration detainees to fill an entire jail pod or dorm.

Nine of the 13 September 11 detainees we interviewed at Passaic in May 2002 said they shared dayrooms with sentenced criminal inmates during some portion of their custody at Passaic. The detainees said they knew this through their conversations with the inmates and based on the color of the wristbands worn by different inmates at the facility (according to Passaic staff, federal detainees wore red wristbands while county inmates wore white wristbands). Our review of the Passaic housing records also confirmed that at least 7 of the 13 September 11 detainees we interviewed were housed with sentenced criminal inmates for periods ranging from 1 week to 5 months. Bendl confirmed that Passaic periodically housed September 11 detainees with sentenced inmates, but he said only with inmates serving sentences of less than one year for crimes such as shoplifting, simple assault, and drug possession. We could not confirm this statement because the housing records we reviewed did not contain information about inmates' criminal history.

All the September 11 detainees we interviewed expressed concern for their safety or were fearful to some degree. One detainee told the OIG that he shared a dormitory with county detainees for five months and did not feel safe. He was eventually moved to a unit with other INS detainees. Another detainee complained about being moved from an INS housing unit to a unit housing county inmates. A third detainee complained about problems he and fellow Muslims were having, not with county inmates but with other INS detainees.

Case Study 5:

We interviewed a September 11 detainee who said that he and other Muslim detainees were being intimidated by two INS criminal aliens, both aggravated felons. He told the OIG that when he and his fellow Muslims quietly conducted afternoon prayers in the common dayroom, these two criminal aliens turned up the volume on the television. When he asked them to turn the volume down, the criminal aliens refused and warned the detainee not to do anything about it.

The detainee said he complained to Passaic staff about this problem to no avail. In addition, the detainee said that no assistance was forthcoming from the INS because staff from the INS Newark District had

not visited his unit.[133] After the detainee raised this issue with the OIG during his interview, Passaic staff moved one of the criminal aliens out of the September 11 detainee's housing unit.

We saw no evidence that the INS Newark District reviewed the housing assignments of September 11 detainees in Passaic. According to Deputy Warden Bendl and Passaic officers who had regular contact with the Newark District, INS officials did not ask about the detainees' housing assignments. Bendl told the OIG that the INS Newark District left the housing decisions for September 11 detainees to Passaic officials.

When we interviewed INS Newark District officials, the two INS Newark detention officers responsible for visiting INS detainees at Passaic told us that they were not certain whether INS detainees were segregated from county detainees. Another INS Newark detention officer we interviewed told us that he thought the INS had no policy for segregating September 11 detainees from county inmates. These responses illustrate that INS Newark District detention officers with responsibility for monitoring INS detainees at Passaic did not ensure that INS policies on classifying and housing INS detainees were followed at Passaic.

B. SDU Housing Reviews

We found that Passaic and the INS also did not maintain adequate records about September 11 detainees placed in the facility's SDU. According to INS detention standards, each detainee's file should contain a written record explaining the reasons why, and for how long, a detainee was confined in the SDU.

We did not find any SDU housing records in the files of the September 11 detainees, even though our review of the Passaic SDU Log from September 12, 2001, to May 30, 2002, indicated that eight September 11 detainees were housed in the Passaic SDU for various lengths of time during this period.[134] Our review of SDU logs showed that:

- Two September 11 detainees were placed in the SDU for medical isolation, one for chicken pox from October 28 to October 30,

[133] We discuss INS Newark District oversight issues later in this chapter.

[134] The SDU Log records the names of the inmates in the SDU, the date they entered the SDU, the infraction they were charged with, the release date, and any special problems or restrictions.

2001, and one for pink eye from December 13 to December 18, 2001.

- Two September 11 detainees were sent to the SDU for assaulting a third September 11 detainee. The SDU Log records that one was in the SDU from January 8 to January 9, 2002; the other from January 8 to January 18, 2002. In the incident report, the victim stated that the two detainees pulled him out of bed and began hitting and punching him. The assaulted detainee was taken to a local hospital emergency room for stitches.

- One detainee spent eight days (from December 1 to December 8, 2001) in the SDU. The incident report documents that upon arrival at Passaic, the detainee was instructed to remove his clothing as part of the initial booking process. He refused to obey multiple orders and began to argue with the officer. According to the report, the detainee walked up to the officer, put his finger into the officer's chest, and continued to argue. The officer took his arm and brought him to the ground to handcuff him. After a struggle, another officer handcuffed the detainee. Medical staff who examined the detainee a short time later observed no signs of injury.

- One detainee spent 24 days in the SDU (from December 18, 2001, to January 10, 2002) based on an FBI request to segregate the detainee. We were unable to determine the reason for the segregation request.

- One detainee spent his first four days at Passaic in the SDU after being transferred from the MDC on March 25, 2002. The detainee told the OIG that he was segregated because of his physical and mental condition at the time. The detainee stated that when he arrived at Passaic he was depressed, non-communicative, and could not walk after spending six months at the MDC. Passaic officials segregated him from other inmates and detainees until they could assess his condition.

- A September 11 detainee was placed in the SDU for 14 days (from May 19 to June 2, 2002) for threatening and assaulting a Passaic correctional officer, using abusive language, and for refusing to obey an order.[135]

[135] This incident is discussed in Case Study 6 in this chapter.

An INS Newark District Supervisory Detention Officer told the OIG that Passaic officials did not consistently inform the INS Newark District when INS detainees were placed in the SDU, contrary to instructions from Deputy Warden Bendl and Passaic policy. The only SDU record we found in the INS Newark District files regarding a September 11 detainee was for the detainee who served 14 days in the SDU for threatening and assaulting a correctional officer. After our inspection visit of Passaic in May 2002, the INS initiated a requirement that IGA facilities like Passaic must inform the local INS District office when a detainee is transferred to the SDU.

When asked about the lack of documentation in September 11 detainee files and the failure to consistently notify the Newark District when INS detainees were moved to the SDU, Bendl said that prior to January 2002 Passaic staff often notified the INS Newark District by telephone about incidents involving INS detainees, including placement of detainees in the SDU. After January 2002, he instructed his staff to fax incident reports involving INS detainees to the INS Newark District, including when a September 11 detainee was housed in the SDU. Bendl offered no explanation as to why, despite his instructions to his staff, the SDU report regarding the detainee transferred from the MDC on March 25, 2002, was not forwarded to the INS Newark District Office.

IV. ACCESS TO LEGAL COUNSEL

We found that September 11 detainees housed at Passaic generally received the same access to counsel as non-September 11 INS detainees. Furthermore, in contrast to detainees held at the MDC, the Passaic detainees generally had no difficulty contacting attorneys or family members, and attorneys and family members had no systemic difficulty locating the detainees or contacting them.

A. Background

Deputy Warden Bendl told us that if an attorney called or visited Passaic to speak to a specific INS detainee, Passaic staff would confirm for the attorney that the detainee was housed at the facility. Passaic officials said they asked attorneys to schedule appointments to see detainees at least 24 hours in advance. One attorney for a September 11 detainee in our sample stated that when he first contacted Passaic he was told that his client was not being held at the facility when, in fact, he was. When asked about this attorney's experience, Bendl told us he was unaware of the specific incident, but that it likely was due to a simple mix-up. Bendl said some detainees used more than

one name and frequently there was confusion among Passaic staff about spelling and name order.[136]

None of the 13 September 11 detainees we interviewed indicated that their family members were not informed that they were held at Passaic. At Passaic, family and friends were allowed to visit detainees. In contrast, only immediate family members were permitted to visit September 11 detainees confined at the MDC.

According to Bendl, in January 2002 immigration rights groups began contacting Passaic officials requesting information about September 11 detainees held at the jail. Bendl said Andrea Quarantillo, the INS Newark District Director, ordered Passaic to direct all such inquiries regarding September 11 detainees to the INS Newark District. At the same time, the INS requested that Passaic staff ask attorneys to present copies of INS Form G-28 (the document filed with the INS that indicates an attorney is representing a particular detainee) prior to their visit at Passaic.

In the spring of 2002, INS Headquarters issued at least two policies affecting dissemination of information on September 11 detainees. An April 8, 2002, memorandum from the INS's Office of General Counsel (OGC) to all INS detention facilities, including contract facilities like Passaic, requested that facilities notify the OGC of any requests for information that could disclose the identities of September 11 detainees. In addition, in May 2002 Passaic Warden Meyers received a copy of an interim INS rule regarding release of information on INS detainees. This interim rule, effective on April 17, 2002, stated that detention facilities such as Passaic "shall not release information" on September 11 detainees and that requests for public disclosure of such information will be directed to the INS. These two policies continued the restrictions on the extent to which Passaic could release information on September 11 detainees to the media, immigration advocacy groups, or anyone other than individual detainees' family, friends, or legal counsel. According to Quarantillo, the INS Newark District released the detainees' locations to detainees' attorneys and family members if they requested.

[136] Bendl also said that particularly in the months immediately following the September 11 attacks, many detainees were being transferred in and out of the facility and there was confusion over the correct names of the detainees. If an attorney or family member called to find out if a detainee was being held at Passaic, Bendl said they might have been told "no" if the name the caller provided did not correspond exactly to the name on file at Passaic, even though the detainee may have been present.

B. Legal Telephone Calls

The INS's policy on telephone access for immigration detainees states that contract facilities such as Passaic "shall permit immigration detainees to make direct calls" to obtain or consult with legal representatives.[137] Further, the policy states that, "the facility shall enable all detainees to make calls to the INS-provided list of free legal service providers and consulates at no charge to the detainee or the receiving party." However, Passaic's inmate handbook states that all calls by detainees must be collect, including calls to legal counsel. We found that all detainee calls made to attorneys, except for those facilitated by the Passaic ombudsman (discussed later), were collect calls.[138]



Image 6: This image depicts telephones in one of the Passaic dayrooms used by September 11 detainees. *Photograph dated May 24, 2002.*

Five of the 13 September 11 detainees we interviewed at Passaic told the OIG that their attorneys' offices did not accept collect calls. Warden Meyers and two other Passaic employees confirmed that several attorneys would not accept collect calls from September 11 detainees. A Passaic ombudsman also told us that he was aware that INS detainees were having problems contacting

[137] INS Detention Standard, "Telephone Access," September 20, 2000.

[138] Detainees' access to telephones differed somewhat depending on where a detainee was housed at Passaic. All telephones were located in the dayrooms. Dayroom access for the detainees in the dormitories was unrestricted. Therefore, these detainees could use the telephones anytime during the day. However, dayroom access for the detainees in the 2-man cells that comprised pods was more restricted. These detainees could use the telephones from 8:00 a.m. to 11:00 p.m.

attorneys on the INS pro bono list in the days after September 11, 2001, because some attorneys would not accept collect calls.

To address this problem, beginning on September 28, 2001, Passaic officials permitted September 11 detainees to place direct calls to their attorney or consulate free of charge from the facility ombudsman's office. According to an ombudsman, he would schedule a time for the detainee to come to his office to make a legal call at no cost to the detainee or the person being called after receiving a written request from a detainee.[139]

We interviewed two correctional officers who served as ombudsmen at Passaic. One had served as ombudsman for five years, while the other served in this position from September 2001 to February 2002. Both said they made rounds in the units once a day, told the detainees they were available for assistance in making legal telephone calls, and collected written requests from detainees who wanted to place calls. In addition, they said requests to use the telephone could be transmitted to them through other Passaic staff. The ombudsmen told the OIG that they permitted numerous detainees to place legal calls from their office because the detainees had no money or their attorneys would not accept collect calls. The ombudsmen also said they assisted interested detainees in contacting their consulates. Detainees we interviewed confirmed that the ombudsmen facilitated their legal calls.

C. Pro Bono Attorney List

We found that pro bono attorney lists were not consistently provided to September 11 detainees housed at Passaic, as required by INS regulations, although lists were posted at the jail.

According to INS regulations, INS officers who processed the September 11 detainees were responsible for providing each detainee upon arrest "with a list of the available free legal services . . . located in the [INS] district."[140] The INS Newark Assistant District Director for Investigations told the OIG that INS staff provided detainees with pro bono attorney lists when they were processed in the INS Newark District and before they were sent to detention facilities such as Passaic.

As discussed in Chapter 7, the Executive Office for Immigration Review (EOIR) is responsible for maintaining lists of pro bono attorneys who offer free legal services to immigration detainees in each INS District. According to

[139] The ombudsman makes daily rounds in the housing units and serves as a liaison between the inmates and facility staff to address any problems.

[140] 8 C.F.R. § 287.3(c).

federal regulations, each INS facility, including Passaic, is also required to "promptly and prominently post" the pro bono attorney lists "in detainee housing units and other appropriate areas."[141]

According to Warden Meyers and Deputy Warden Bendl, Passaic employees posted laminated copies of the pro bono attorney lists in the detainees' dayrooms and in the law library at Passaic. However, Bendl stated that it was not facility policy to give each detainee a copy of the pro bono list. He also acknowledged that not all the units in which the INS detainees were housed posted the lists.

Four of the 13 September 11 detainees we interviewed stated they never received a list of pro bono attorneys either from the INS or Passaic staff. Three other detainees said they saw a posted list, two said they obtained lists from immigration judges at their hearings, one said he had a list from another New Jersey facility from which he was transferred, and one did not recall if he received a list.

Three of the 13 September 11 detainees we interviewed already had attorneys when they arrived at Passaic, and three additional detainees contacted their families who arranged to hire attorneys. The other seven detainees said they depended upon the pro bono list or word of mouth from other detainees to find legal representation.

None of the eight legal organizations on the list of pro bono attorneys provided to Passaic officials by the INS Newark District listed toll free numbers.

D. Legal Rights Presentations

We found that Passaic took steps to ensure that September 11 detainees were aware of and able to attend legal rights presentations. In addition, we found that the INS Newark District was generally responsive to organizations seeking to conduct legal presentations at Passaic.

First, according to Deputy Warden Bendl, all INS detainees who entered Passaic after November 2001 were shown a video informing them of their rights at the facility, including their legal rights. This video was provided by the INS Newark District and shown after the detainees' initial processing at the facility.

Second, Passaic detainees were given legal rights presentations by immigration groups. These "Know Your Rights" presentations are designed to inform INS detainees about U.S. immigration law and INS procedures. According to INS standards, attorneys and legal groups who wanted to conduct

[141] INS Detention Standard, "Visitation," September 20, 2000.

a legal presentation at Passaic were required to submit a written request and an agenda to INS Newark District Director Quarantillo. When approved, INS Newark District officials notified Passaic staff, who in turn contacted the requesting organization to arrange a date and time for the presentation. According to Newark District officials, no requests were refused.

Bendl said legal presentations to detainees were limited generally to one hour, but could be extended at the discretion of Passaic staff. Detainees were required to sign up for the sessions 24 hours in advance and newly arrived detainees were given preference. According to Bendl, the number of detainees who could attend was limited only by the capacity of Passaic's chapel, the room where the presentations were held, which held approximately 200 people. None of the 13 September 11 detainees we interviewed at Passaic complained about a lack of legal rights presentations or said they were not permitted to attend such presentations.

The American Friends Services Committee conducted the first legal rights presentation at Passaic on March 10, 2002, after submitting a request in mid-February to the INS Newark District. Quarantillo said that beginning in March 2002 and lasting for several months, legal rights groups made presentations at Passaic an average of "every other week." Between March and May 2002, Passaic officials blocked out two hours every Tuesday for legal rights presentations, and Bendl said between 20 and 70 detainees attended each session.

V. ALLEGATIONS OF PHYSICAL AND VERBAL ABUSE

Unlike at the MDC, we did not find evidence of a pattern of physical abuse of September 11 detainees at Passaic. Eleven of the 13 detainees we interviewed during our site visits said they were not subjected to any physical abuse while at Passaic.[142] The twelfth September 11 detainee at Passaic who we interviewed claimed that he was physically abused by correctional officers at Passaic. See Case Study 6 below. The thirteenth detainee we interviewed, who transferred to Passaic from the MDC, refused to discuss the issue with us. He told the OIG, however, that his situation at Passaic was "tolerable" compared to his situation at the MDC.

With regard to allegations of verbal abuse, 3 of the 13 Passaic detainees we interviewed said that on several occasions Passaic staff verbally harassed them with ethnic slurs.

[142] These reports are significantly different than what we heard at the MDC, where 12 of the 19 September 11 detainees we interviewed told us they were subjected to some form of physical abuse.

Passaic officials told the OIG that any complaints of physical or verbal abuse are referred to the Passaic Internal Affairs Division. The Passaic Internal Affairs Division officer responsible for receiving such referrals said that except for the incident described in Case Study 6, his office received no complaints from September 11 detainees about physical or verbal abuse.

Case Study 6:

On May 23, 2002, we interviewed a September 11 detainee at Passaic who had a black eye and walked with a limp, which he said resulted from a series of altercations with Passaic correctional officers on the evening of May 19, 2002.

According to incident reports and the Passaic SDU log, at 4:30 p.m. the detainee, who was supposed to receive a vegetarian meal, took a food tray with chicken. When a correctional officer ordered him to return it, an argument ensued and the officer notified the Sergeant on duty. At 5:30 p.m., the Sergeant took the detainee to his cell and told him to gather his belongings because he was going to be taken down to the first floor to be assigned to a different housing unit for using abusive language toward a correctional officer.

The Sergeant and a Lieutenant who escorted the detainee alleged that in a corridor on the first floor the detainee assaulted the Sergeant. By contrast, the detainee told us that the Sergeant initiated the hostilities by threatening him for talking back to the Sergeant. Officers forced the detainee to the floor, handcuffed his arms behind his back, and took him to the SDU because he continued to yell threats at them.

At 6:40 p.m., medical staff examined the detainee who, according to the medical records, was lying on the floor alert, able to speak, with no shortness of breath. The detainee said that his chest hurt, but he refused any treatment or medication. Medical staff prescribed Tylenol and scheduled him to see the doctor in the morning. The medical department noted the detainee did not appear to have difficulty breathing because he was very loud and vocal. When the detainee returned to his cell, he began yelling and kicking the door.

At about 8:15 p.m., two other officers visited the detainee's cell to discuss the incident report. According to the officers, the detainee was belligerent, uncooperative, and verbally abusive. He took the incident report from the officers and refused to give it back. The detainee was ordered repeatedly to place his hands outside the cell to be handcuffed, but he refused to do so. One officer advised the detainee that if he did not cooperate, he would be sprayed with mace. The detainee still did not

return the report or allow the officers to handcuff him. The officers sprayed him with mace, entered the cell, handcuffed him, and retrieved the incident report. The detainee was taken to the shower to rinse his face and then to the medical department because he claimed he was having difficulty breathing.

According to the detainee, the officers wanted him to sign a paper, but he refused because they would not let him read it. He said the argument escalated and several officers entered his cell to subdue him. During the ensuing struggle, the detainee said someone pushed him to the floor; pressed a knee against his neck, making it difficult for him to breathe; kicked him in the side; pepper-sprayed him; and punched him in the eye. As a result of the incident, the detainee claimed he suffered severe back pain, a badly swollen black eye, chest pains, and injuries that prevented him from standing, required him to use a wheelchair, and resulted in a permanent limp.

Subsequent to the incident, the detainee's left eye became badly swollen and he complained of chest and back pain. By 12:41 a.m. on May 21, 2002, the detainee complained that he could not move his legs. According to an incident report, Passaic staff placed him in a wheelchair, took him to the Passaic medical department where he was examined, and sent him to a local hospital emergency room for evaluation.

The hospital emergency room discharge report recorded the detainee's complaint that he could not move his right leg and observed that his left eye was blackened and swollen shut. He was x-rayed, given pain medications, and referred to an ophthalmology clinic. The doctors who examined the detainee determined he was in good health and had no spinal or back injuries.

According to the detainee, several days after his visit to the hospital guards brought a dog from Passaic's canine unit into his SDU cell when he informed officers that he was unable to get out of bed. He alleged that the guards told him that if he did not get out of bed by the next day, they were going to "let the dog loose." Passaic officers told us that it is not unusual to make rounds with dogs, including in the SDU area, but denied that they threatened to use the dogs on the detainee.

The OIG's Investigations Division investigated the incident and presented the evidence in the case to the Civil Rights Division, which declined criminal prosecution. The OIG is currently conducting an ongoing administrative investigation of the matter.

The OIG received three other complaints related to allegations of physical or verbal abuse of September 11 detainees housed at Passaic. In one case, a detainee alleged that unidentified officers verbally abused him when he arrived at the facility in October 2001. He also alleged that unidentified officers deprived him of adequate recreation, medical care, and food, and placed handcuffs on him so tightly and for such a long time that it caused damage to his wrist. The detainee's medical records disclosed no report of injuries to his wrist. The Civil Rights Division declined prosecution in June 2002, and the OIG referred the allegations to the INS. It is unclear what further investigative actions the INS plans to take.

In the second case, a September 11 detainee informed the INS that while he was held at Passaic from October 2001 to April 2002, he was not provided adequate medical care, recreation, diet, or living conditions. He also alleged that unidentified officers hit, verbally abused, and threatened him, although he did not identify specific incidents. The detainee's medical records contained no evidence of the injuries he claimed he suffered. The INS also did not find any records of complaints filed by the detainee while he was at Passaic. The INS did not interview the detainee before he was removed to Morocco on July 8, 2002. However, in October 2002 the INS conducted an official review of Passaic's conditions of confinement to assess the detainee's allegations that Passaic failed to provide adequate medical care, recreation, diet, or living conditions. The INS gave Passaic "acceptable" ratings in each of these categories.

Finally, a September 11 detainee alleged that when he was transferred to Passaic in October 2001, an unidentified officer dragged him by his neck to a room and kicked him in the ankles, feet, and groin. He also alleged he was verbally abused by officers. The Civil Rights Division declined prosecution of the case. The OIG referred the allegations to the INS, and the INS referred the case to local INS management. Local INS management reviewed the detainee's medical records, but it appears that they did not investigate the matter further.

VI. OTHER ISSUES

A. Medical Care

Our review found that Passaic provided September 11 detainees with the medical and dental screenings required by INS standards. These standards require facilities like Passaic that house federal immigration detainees to provide "24-hour, 7 days per week emergency medical and dental care." According to the Passaic Medical Director, Passaic has three shifts of medical staff to provide round-the-clock coverage with a staff nurse conducting rounds in each unit every eight hours. In addition, the Medical Director said the nursing staff collects written requests for medical treatment from detainees daily and provides treatment based on a "priority of need." These written

requests for treatment are similar to the "copout system" used at the MDC, which we discuss in Chapter 7.

According to Warden Meyers, September 11 detainees arriving at Passaic were examined initially by a nurse practitioner and received a follow-up exam by a doctor. Based on our interviews and a review of Passaic's medical files, we determined that all 66 September 11 detainees in our Passaic sample, including the 13 detainees we interviewed, received an initial health screening at Passaic upon their arrival and a physical examination within the 14-day time frame prescribed by INS standards.

Our review of requests for medical attention submitted by 12 of the 13 September 11 detainees we interviewed found that Passaic medical staff were responsive to these written requests for treatment.[143] According to Passaic records, these 12 detainees filed 34 requests for medical treatment. We found that 47 percent of the requests (16 of the 34) were fulfilled within 2 to 3 days and 70 percent (24 of the 34) were fulfilled within one week.

Two September 11 detainees we interviewed complained about untimely medical care at Passaic. We reviewed their medical records and found that one of the detainees had submitted two undated medical request forms and received treatment on both occasions, but we were unable to determine the timing of the treatment in relation to the requests. The other detainee said he complained of a toothache and was seen by medical staff four days later. He later complained of back pains and was seen eight days later.

B. Hunger Strikes

INS regulations applicable to the September 11 detainees at Passaic recognize a hunger strike when a detainee has refused food for 72 consecutive hours. According to Bendl, Passaic staff generate an incident report each time an INS detainee refuses a meal. A copy of each incident report is then sent to the Passaic medical staff and the INS Newark District. In the case of a detainee missing one meal, the INS Newark District files the Passaic incident report in the detainee's detention folder.

We obtained and reviewed incident reports on the 66 detainees in our Passaic sample from September 20, 2001, to May 23, 2002. Of the 66 detainees in our sample, three refused to eat a meal, which warranted an incident report. Of the three detainees who missed meals, two were in the Special Detention Unit (SDU) at the time they declared themselves to be on a hunger strike. However, these two detainees each missed only two consecutive meals, and therefore their actions did not qualify as hunger strikes according

[143] Passaic could not provide the treatment record for one of the 13 detainees.

to INS regulations. One detainee stated he could not eat any food that contained milk by-products, and the second detainee said he was unjustifiably placed in the SDU for 30 days. According to an incident report, a third detainee stated that he was on a hunger strike because the INS left him at Passaic for eight months, during which time he should have been removed from the United States. He said that he was not upset with Passaic staff and that his dispute was with the INS. Beginning the third day of the detainee's hunger strike, Passaic medical staff began monitoring his medical condition daily. His hunger strike lasted eight days.

C. Recreation

Passaic has two rooftop gyms for outdoor recreation. In addition, Passaic has two indoor exercise areas: a weight room and a recreation/exercise room. We could not determine whether September 11 detainees were afforded the required recreation time. The INS Detention Standard for Recreation requires that, weather permitting, contract facilities like Passaic shall make outdoor recreation available for detainees at least one hour a day, five days a week, at a reasonable time of day. Passaic officials we interviewed asserted that all detainees were scheduled for one hour of recreation daily. However, 6 of the 13 September 11 detainees we interviewed stated that they were offered the opportunity to go to the outdoor gym only every few weeks. Seven of the 13 detainees told the OIG that they were offered recreation only 3 times a week.

From the Passaic records, we could not determine whether the September 11 detainees were scheduled for recreation and whether they actually received recreation. When asked about the claims some detainees made about not receiving adequate recreation time, Deputy Warden Bendl and two correctional officers cited the limited size of the gyms, the lack of correctional officers to oversee movements of detainees to and from the gyms, and weather as the three factors that prevented detainee access to the outdoor recreation facilities as often as scheduled.

VII. INS NEWARK DISTRICT MONITORING OF SEPTEMBER 11 DETAINEES

We found that the INS Newark District did not sufficiently monitor September 11 detainees housed at Passaic, despite claims by INS Newark District management about the frequency and duration of their visits to Passaic.

The INS Newark District primarily monitored September 11 detainees at Passaic by sending INS Detention and Removal (D&R) staff to visit the facility. The INS did not have formal standards dictating how often INS Newark District staff were required to visit September 11 detainees at Passaic, according to David Venturella, the Deputy Executive Associate Commissioner of the INS's Office of Detention and Removal. According to the IGA between Passaic and

the INS, Passaic agreed to allow "periodic inspections" of its facility by the INS to ensure that a "minimally acceptable level of services" was provided to INS detainees. According to a supervisory detention officer (SDO) at the INS Newark District, these inspections are conducted annually by jail inspectors from the INS Newark District Office of D&R.

The INS Newark Assistant District Director for Detention and Deportation told the OIG that the purposes of these visits included communicating with detainees on their cases, hearing detainee complaints, observing jail conditions, discussing matters of mutual interest with Passaic management, and serving INS documents on September 11 detainees.[144]

An INS Newark District SDO told the OIG that the INS Newark District's unofficial goal was to have an officer from its Office of D&R visit facilities with more than 100 INS detainees, such as Passaic, every day.[145] According to the SDO, facilities with less than 100 INS detainees were supposed to be visited by an INS Newark District D&R officer at least one to three times every other week. The INS Newark Assistant District Director for Detention and Deportation said that INS Newark District staff visited Passaic at least three days per week and spent approximately six hours at the facility each visit. According to INS Newark District officials, 11 INS removal officers – 10 of whom were detailed from the INS New York District – conducted the site visits to county jails in the INS Newark District, including Passaic, from October 2001 to May 2002.

We evaluated the frequency of visits to Passaic by INS Newark District staff from the weeks ending January 19 to March 2, 2002, a 7-week period during which Passaic consistently housed more than 100 INS detainees.[146] During this period, INS Newark District staff should have visited Passaic daily (five days per week), according to the INS Newark District. However, we found that INS District Newark staff visited Passaic daily in only 1 week during this 7-week period. After the INS detainee population slipped below 100 during the week ending March 9, 2002, we found that INS Newark District staff generally attained their goal of visiting Passaic 1 to 3 times every other week. However, no INS Newark District staff visited Passaic from April 28 to May 12, 2002.

[144] When the INS changed the name of the Office of Detention and Deportation to the Office of Detention and Removal, it did not change personnel titles.

[145] A review of INS data determined that Passaic housed a weekly average of more than 100 INS detainees from October 7, 2001, to March 2, 2002.

[146] The length of visits by INS Newark District staff for the weeks beginning March 3, 2002, and April 14, 2002, was unclear in Passaic records and therefore was not included in our analysis.

With respect to the length of their visits, our analysis determined that INS Newark District staff spent an average of from 0.5 to 3 hours at Passaic during the 7-week period described above, contrary to the INS's claim that INS Newark District staff generally spent six hours at Passaic during each visit. In fact, we estimated that INS Newark District staff spent less than two hours per visit at Passaic during this 7-week period.

In addition, we found that the INS Newark District failed to prepare required reports for all incidents involving September 11 detainees reported by Passaic staff. Under INS regulations, INS Newark District officials should have sent reports on more serious detainee issues – such as hunger strikes or assaults involving prison guards – to officials at INS Headquarters in Washington, D.C., but we found that this did not occur.

VIII. OIG ANALYSIS

The Passaic County Jail housed 400 September 11 detainees from the date of the terrorist attacks through May 30, 2002, which represented the most September 11 detainees held at any single detention facility. Unlike most of the detainees housed at the MDC, who were considered of "high interest" to the Department's PENTTBOM investigation, most of the detainees sent to Passaic were considered by the FBI to be "of interest," "of undetermined interest," or "no longer of interest."

The Passaic detainees had much different (and significantly less harsh) detention experiences than those at the MDC for a variety of reasons. First, Passaic staff – unlike staff at the MDC – had more than 15 years' experience handling INS detainees, and was familiar with INS procedures related to immigration detainees. Second, September 11 detainees were treated similarly to "regular" INS detainees housed at Passaic and were not singled out for more restrictive detention. Unlike the September 11 detainees at the MDC, they were not locked down 23 hours a day, were not placed in four-man holds during movement, and had much more liberal phone call and visitation privileges. Highly restrictive confinement conditions were the exception rather than the rule for September 11 detainees at Passaic, in stark contrast to the MDC where all detainees were confined in the facility's ADMAX SHU.

September 11 detainees at Passaic had more independence and flexibility to obtain and communicate with legal counsel. Attorneys representing Passaic detainees did not experience the same level of difficulty experienced by attorneys seeking to visit their MDC detainee-clients. However, Passaic's policy of permitting detainees to place only collect telephone calls initially hampered their ability to consult with legal counsel. To their credit, Passaic officials quickly realized the difficulty some September 11 detainees were experiencing in obtaining legal counsel and, on September 28, 2001, took steps to address

this problem by providing detainees access to a telephone in a staff member's office to place legal telephone calls free of charge.

We found that Passaic and INS Newark District officials also took steps to educate September 11 detainees about the immigration process by permitting various immigration groups to conduct "Know Your Rights" presentations at the facility. In addition, Passaic officials permitted regular visits by family members and friends of September 11 detainees, unlike at the MDC where only visits by immediate family members were permitted.

Our review did not find a pattern of physical and verbal abuse against September 11 detainees held at Passaic by correctional officers. The majority of detainees we interviewed stated they had not experienced any such abuse. With regard to allegations of verbal abuse, 3 of the 13 September 11 detainees we interviewed alleged that Passaic staff verbally harassed them, primarily by using ethnic slurs. The Passaic officers we interviewed denied making such remarks. While any such slurs are offensive and unacceptable, we found that the level of these allegations at Passaic was markedly different from the pervasive complaints we heard from detainees confined at the MDC.

We also concluded that Passaic staff provided appropriate medical and dental screenings and facilitated adequate access to medical services for the September 11 detainees. We found that Passaic medical staff was responsive to written requests for treatment by the detainees. The Passaic detainees were offered recreation opportunities, although not with the frequency specified by both INS and Passaic standards.

Finally, we found that INS Newark District staff conducted insufficient and irregular visits to September 11 detainees at Passaic, and the number and lengths of these visits were significantly less than INS District management claimed. We also found that INS Newark District staff was not receiving all Passaic incident reports or reviewing available documentation during visits to the facility. Consequently, we question whether the INS Newark District was adequately monitoring the conditions of confinement experienced by September 11 detainees at Passaic. We believe the INS Newark District should have made more effort to monitor the September 11 detainees, especially since the detainees were housed at a non-INS facility, which reduced the INS's interaction with the detainees.

In sum, we found that the conditions of confinement for September 11 detainees at Passaic were significantly less harsh than those experienced by detainees at the MDC.

CHAPTER NINE

OIG RECOMMENDATIONS

We recognize the tremendous challenges the FBI, INS, BOP, and other Department components faced as they responded to the September 11 attacks and mobilized to prevent additional attacks during a chaotic period. We also recognize the dedication exhibited by many Department employees in response to the attacks. Without diminishing their contributions in any way, we believe the Department can learn from the experience in the aftermath of the September 11 attacks, and we therefore offer a series of recommendations to address the issues we examined in our review.

I. UNIFORM ARREST AND DETAINEE CLASSIFICATION POLICIES

The FBI New York Field Office and its Joint Terrorism Task Force (JTTF) aggressively pursued thousands of PENTTBOM leads in the weeks and months after the terrorist attacks. Many leads that resulted in an alien's arrest on immigration charges were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant. However, we found the FBI and INS in New York City did little to distinguish the aliens arrested as the subjects of PENTTBOM leads or where there was evidence of ties to terrorism from those encountered coincidentally to such leads with no indication of any ties to terrorism.

The FBI's New York Field Office took an aggressive stance when it came to deciding whether any aliens arrested on immigration charges were "of interest" to its terrorism investigation. Witnesses both inside and outside the FBI told us that the New York FBI interpreted and applied the term "of interest" to the September 11 investigation quite broadly. Consequently, all aliens in violation of their immigration status that the JTTF encountered in the course of pursuing PENTTBOM leads – whether or not the subjects of the leads – were arrested, classified as September 11 detainees, and subjected to the full FBI clearance investigation, regardless of the factual circumstances of the aliens' arrest or the absence of evidence connecting them to the September 11 attacks or terrorism. This contrasted with procedures used elsewhere in the country, where aliens were assessed individually before being considered "of interest" to the terrorism investigation and therefore subject to the full FBI clearance investigations.

Moreover, the FBI's initial "interest" classification had an enormous impact on the detainees because it determined whether they would be housed in a high-security BOP facility like the MDC or in a less restrictive setting like Passaic. In addition, the decision to label an alien a "September 11 detainee"

versus a "regular immigration detainee" significantly affected whether bond would be available and the timing of the detainee's removal or release.

1. We believe the Department and the FBI should develop clearer and more objective criteria to guide its classification decisions in future cases involving mass arrests of illegal aliens in connection with terrorism investigations. For example, the FBI could develop generic screening protocols (possibly in a checklist format) to help agents make more consistent and uniform assessments of an illegal alien's potential connections to terrorism. These protocols might require some level of evidence linking the alien to the crime or issues in question, and might include an FBI database search or a search of other intelligence and law enforcement databases.

 In addition, the FBI should consider adopting a tiered approach to detainee background investigations that acknowledges the differing levels of inquiry that may be appropriate to clear different detainees of connections to terrorism. For example, a more streamlined inquiry might be appropriate when the FBI has no information that a detainee has ties to terrorism, while a more comprehensive background investigation would be appropriate in other cases.

2. The FBI should provide immigration authorities (now part of the Department of Homeland Security (DHS)) and the BOP with a written assessment of an alien's likely association with terrorism shortly after an arrest (preferably within 24 hours). This, in turn, would assist the immigration authorities in assigning the detainee to an appropriate detention facility and the BOP in determining the appropriate security level within a particular facility. In addition, the FBI should promptly communicate any changes in its assessment of the detainee's connection to terrorism so that the DHS and BOP can make appropriate adjustments to the detainee's conditions of confinement.

3. The FBI did not characterize many of the September 11 detainees' potential connections to terrorism and consequently they were treated as "of undetermined interest" to the terrorism investigation. In these cases the INS, in an understandable abundance of caution, treated the alien as a September 11 detainee subject to the "hold until cleared/no bond" policies applicable to all September 11 detainees. This lack of a characterization by the FBI also resulted in prolonged confinement for many detainees, sometimes under extremely harsh conditions. Unless the FBI labels an alien "of interest" to its terrorism investigation within a limited period of time, we believe the alien should be treated as a "regular" immigration detainee and processed according to routine procedures. In any case, the DHS should establish a consistent

mechanism to notify the FBI of its plans to release or deport such a detainee.

II. INTER-AGENCY COOPERATION ON DETAINEE ISSUES

The INS relied on the FBI to provide evidence about the detainees that it could use in bond and removal proceedings. When this information was not forthcoming in a timely manner, the INS had to request multiple continuances in bond hearings and other immigration proceedings in an effort to maintain the detainees in custody. In many of these cases, the INS's arguments against granting bond to the Immigration Court were based on little more than the fact the detainees were arrested in connection with PENTTBOM leads.

4. Unless the federal immigration authorities, now part of the DHS, work closely with the Department and the FBI to develop a more effective process for sharing information and concerns, the problems inherent in having aliens detained under the authority of one agency while relying on an investigation conducted by another agency can result in delays, continuing conflicts, and concerns about accountability. At a minimum, we recommend that immigration officials in the DHS enter into an Memorandum of Understanding (MOU) with the Department and the FBI to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. An MOU should specify a clear chain of command for any inter-agency working group. Further, the MOU should specify information sharing and reporting requirements for all members of such an inter-agency working group.

III. FBI CLEARANCE PROCESS

While we appreciate the enormous demands placed on the FBI in the aftermath of the terrorist attacks, we found the FBI did not adequately staff or assign sufficient priority to its process for clearing September 11 detainees of a connection to terrorism. Agents responsible for clearance investigations often were assigned to other duties, which substantially delayed the completion of detainee clearance investigations. Even after the clearance decisions were centralized at FBI Headquarters, FBI officials failed to provide sufficient resources to complete the detainee clearance process in a timely manner. The FBI took, on average, 80 days to clear a September 11 detainee.

5. We believe it critical for the FBI to devote sufficient resources in its field offices and at Headquarters to conduct timely clearance investigations on immigration detainees, especially if the Department institutes a "hold until cleared" policy. The FBI should assign sufficient resources to conduct the clearance investigations in a reasonably expeditious manner, sufficient resources to provide timely information to other agencies (in this case, additional FBI agents to support the SIOC Working Group),

and sufficient resources to review in a timely manner the results of inquiries of other agencies (in this case, completed CIA checks). In addition, FBI Headquarters officials who coordinated the detainee clearance process and FBI field office supervisors whose agents were conducting the investigations should impose deadlines on agents to complete background investigations or, in the alternative, reassign the cases to other agents.

6. We understand the resource constraints confronting the Department in the days and weeks immediately following the September 11 attacks. We also recognize that decisions needed to be made quickly and often without time to consider all the ramifications of these actions. However, within a few weeks of the terrorist attacks it became apparent to many Department officials that some of the early policies developed to support the PENTTBOM investigation were causing problems and should be revisited. Examples of areas of concern included the FBI's criteria for expressing interest in a detainee and the "hold until cleared" policy. We believe the Department should have, at some point earlier in the PENTTBOM investigation, taken a closer look at the policies it adopted and critically examined the ramifications of those policies in order to make appropriate adjustments. We recommend that the Department develop a process that forces it to reassess early decisions made during a crisis situation and consider any improvements to those policies.

IV. NOTICES TO APPEAR

Under federal regulation, the INS was required to decide whether to file immigration charges against an alien within 48 hours of his arrest. However, the regulation contained no requirement with respect to when the INS must notify the alien or Immigration Court about the charges. No statute or regulation explicitly stated when the INS was required to serve the Notice to Appear (NTA) on the alien or the Immigration Court. We found the INS did not consistently serve September 11 detainees with NTAs within its stated goal of 72 hours after arrest. Part of the delay can be traced to the INS's practice in the first several months after the terrorist attacks to having all NTAs reviewed for legal sufficiency at INS Headquarters. Another factor was the miscommunication that resulted when detainees arrested in New York City were transferred to the INS Newark District without having been served NTAs. INS Newark District officials assumed the detainees had been served in New York, while INS New York District officials incorrectly assumed that INS Headquarters had forwarded the NTAs to the INS Newark District for service. These delays affected the detainees' ability to obtain legal counsel and postponed the detainees' opportunity to seek a bond re-determination hearing.

7. We recommend that the immigration authorities in the DHS issue instructions that clarify, for future events requiring centralized approvals

at a Headquarters' level, which District or office is responsible for serving NTAs on transferred detainees: either the District in which the detainee was arrested or the District where the detainee is transferred.

8. We recommend that the DHS document when the charging determination is made, in order to determine compliance with the "48-hour rule." We also recommend that the DHS convert the 72-hour NTA service objective to a formal requirement. Further, we recommend that the DHS specify the "extraordinary circumstances" and the "reasonable period of time" when circumstances prevent the charging determination within 48 hours. We also recommend that the DHS provide, on a case-by-case basis, written justification for imposing the "extraordinary circumstances" exception and place a copy of this justification in the detainee's A-File.

V. RAISING ISSUES OF CONCERN TO SENIOR DEPARTMENT OFFICIALS

Department officials established the "hold until cleared" policy believing that the FBI's clearance process for September 11 detainees would take just a few days. However, in many cases the clearance process stretched on for months and created dilemmas for INS attorneys who handled bond and removal proceedings. The slow pace of the FBI's background investigations, coupled with the lack of individualized evidence connecting specific detainees to terrorism, left INS attorneys with little evidence to argue for continued confinement of the detainees.

The evidence indicated that attorneys in the INS's Office of General Counsel made efforts to raise with some Department officials the issue of whether the INS could refuse to accept bond set by an Immigration Judge when the Government failed to appeal or block a detainee's departure from the country when he had received a final removal order. Yet, when these efforts were unsuccessful, INS officials did not raise the issue at higher levels in the Department or submit their legal concerns in writing until months later.

9. We recommend that Offices of General Counsel throughout the Department establish formal processes for identifying legal issues of concern – like the perceived conflict between the Department's "hold until cleared" policy and immigration laws and regulations – and formally raise significant concerns, in writing, to agency senior management and eventually Department senior management for resolution. Such processes will be even more important now that immigration responsibilities have transferred from the Department to the DHS.

VI. BOP HOUSING OF DETAINEES

At least 84 September 11 detainees arrested on immigration charges in connection with the September 11 investigation were confined at the MDC. The BOP housed these detainees in its ADMAX SHU under extremely restrictive conditions. While the BOP played no role in deciding which detainees were "of interest" or "of high interest" to the FBI, once detainees were transferred to one of its facilities the BOP assumed responsibility for the detainees' conditions of confinement.

The BOP combined a series of existing policies and procedures that applied to inmates in other contexts to create highly restrictive conditions of confinement for September 11 detainees held at the MDC and other BOP facilities. For example, the BOP initially designated September 11 detainees as witness security (WITSEC) inmates, a categorization that restricted public knowledge of and access to the detainees. This designation frustrated efforts by detainees' attorneys, family members, consular officials, and even law enforcement officers to determine the detainees' location, given how tightly information about WITSEC inmates is held. In addition, the BOP's initial communications blackout and its policy of permitting detainees one legal call per week (coupled with arbitrary policies on whether reaching an answering machine counted as the legal call), severely limited the detainees' ability to contact and consult with legal counsel.

10. We recommend that the BOP establish a unique Special Management Category other than WITSEC for aliens arrested on immigration charges who are suspected of having ties to terrorism. Such a classification should identify procedures that permit detainees' reasonable access to telephones more in keeping with the detainees' status as immigration detainees who may not have retained legal representation by the time they are confined rather than as pre-trial inmates who most likely have counsel. In addition, BOP officials should train their staff on any new Special Management Category to avoid repeating situations such as when MDC staff mistakenly informed people inquiring about a specific September 11 detainee that the detainee was not held at the facility.

11. Given the highly restrictive conditions under which the MDC housed September 11 detainees, and the slow pace of the FBI's clearance process, we believe the BOP should consider requiring written assessments from immigration authorities and the FBI prior to placing aliens arrested solely on immigration charges into highly restrictive conditions, such as disciplinary segregation in its ADMAX SHU. Absent such a particularized assessment from the FBI and immigration authorities, the BOP should consider applying its traditional inmate classification procedures to determine the level of secure confinement required by each detainee.

12. We found delays of days and sometimes weeks between when the FBI notified the BOP that a September 11 detainee had been cleared of ties to terrorism and when the BOP notified the MDC that the detainee could be transferred from its ADMAX SHU to the facility's general population, where conditions were decidedly less severe. We recommend that BOP Headquarters develop procedures to improve the timeliness by which it informs local BOP facilities when the detention conditions of immigration detainees can be normalized.

13. We found evidence indicating a pattern of physical and verbal abuse by some MDC corrections staff against some September 11 detainees. While the OIG is continuing its administrative investigation into these matters, we believe MDC and BOP management should take aggressive and proactive steps to educate its staff on proper methods of handling detainees (and inmates) confined in highly restrictive conditions of confinement, such as the ADMAX SHU. The BOP must be vigilant to ensure that individuals in its custody are not subjected to harassment or more force than necessary to accomplish appropriate correctional objectives.

14. BOP and MDC officials anticipated that some September 11 detainees might allege they were subject to abuse during their confinement. Consequently, they took steps to help prevent or refute such allegations by installing cameras in each ADMAX SHU cell and requiring staff to videotape all detainees' movements outside their cells. Unfortunately, the MDC destroyed the tapes after 30 days. We recommend that the BOP issue new procedures requiring that videotapes of detainees with alleged ties to terrorism housed in ADMAX SHU units be retained for at least 60 days.

15. We recommend that the BOP ensure that all immigration detainees housed in a BOP facility receive full and timely written notice of the facility's policies, including procedures for filing complaints. We found that the MDC failed to consistently provide September 11 detainees with details about its Administrative Remedy Program, the formal process for filing complaints of abuse.

16. Some MDC correctional staff asked detainees "are you okay" as a way to inquire whether they wanted their once-a-week legal telephone call. Detainees told the OIG that they misunderstood this question and, consequently, unknowingly waived their opportunity to place a legal call. We recommend that the BOP develop a national policy requiring detainees housed in SHUs to affirm their request for or refusal of a legal telephone call, and that such affirmance or refusal be recorded in the facility's Legal Call Log.

17. We recommend that the MDC examine its ADMAX SHU policies and practices in light of the September 11 detainees' experiences to ensure their appropriateness and necessity. For example, we found that while the MDC offered September 11 detainees exercise time in the facility's open-air recreation cell, they failed to provide suitable clothing during the winter months that would enable the detainees to take advantage of this opportunity. In addition, we found that the MDC kept both lights on in the detainees' cells 24 hours a day for several months after they had the ability to turn off at least one of the cell lights.

VII. OVERSIGHT OF DETAINEES HOUSED IN CONTRACT FACILITIES

18. INS Newark District staff conducted insufficient and irregular visits to September 11 detainees held at Passaic. We also found that Passaic officials did not always inform Newark staff when detainees were placed in the SDU and that Newark officials did not always maintain required records for SDU detainees. Consequently, Newark staff was unable to consistently monitor detainee housing conditions, health issues, or resolve complaints. We recommend that the DHS amend its detention standards to mandate that District Detention and Removal personnel visit immigration detainees at contract facilities like Passaic frequently, with special emphasis on those detainees placed in SDUs, in order to monitor matters such as housing conditions, health concerns, and complaints of abuse. District visits should include an interview of and a review of the records for detainees housed in SDUs. We further recommend that the DHS issue procedures to mandate that contract detention facilities transmit documentation to the appropriate DHS field office that describes the reasons why immigration detainees have been sent to SDUs.

19. We recommend that DHS field offices conduct weekly visits with detainees arrested in connection with a national emergency like the September 11 attacks to ensure that they are housed according to FBI threat assessments and BOP classifications (or other appropriate facility classification systems). In addition, the DHS should ensure that the detainees have adequate access to counsel, legal telephone calls, and visitation privileges consistent with their classification.

VIII. OTHER ISSUES

20. How long the INS legally could hold September 11 detainees after they have received final orders of removal or voluntary departure orders in order to conduct FBI clearance checks was the subject of differing opinions within the INS and the Department. A February 2003 opinion by the Department's Office of Legal Counsel concluded, however, that the

INS could hold a detainee beyond the normal removal time for this purpose. That issue is also a subject in an ongoing lawsuit.

Regardless of the outcome of the court case, we concluded that the Department failed to turn its attention in a timely manner to the question of its authority to detain such individuals. Where policies are implemented that could result in the prolonged confinement of illegal aliens, we recommend that the Department carefully examine, at an early stage, the limits on its legal authority to detain these individuals.

21. The INS failed to consistently conduct Post-Order Custody Reviews of September 11 detainees held more than 90 days after receiving final orders of removal. These custody reviews are required by immigration regulations to assess if detainees' continued detention is warranted. We understand that under Department policy in effect at the time, the INS was not permitted to remove September 11 detainees until it received FBI clearances. We believe the INS nevertheless should have conducted the custody reviews, both because they are required by regulation and because such reviews may have alerted Department officials even more directly that a number of aliens were being held beyond the 90-day removal period. We recommend that the DHS ensure that its field offices consistently conduct Post-Order Custody Reviews for all detainees who remain in its custody after the 90-day removal period.

CHAPTER TEN

CONCLUSIONS

In the aftermath of the September 11 terrorist attacks, the Department of Justice used the federal immigration laws to detain aliens who were suspected of having ties to the attacks or terrorism in general. More than 750 aliens who had violated immigration laws were arrested and detained in connection with the FBI's investigation into the attacks, called PENTTBOM. Our review examined the treatment of these detainees, including their processing, bond decisions, the timing of their removal or release, their access to counsel, and their conditions of confinement. To examine these issues, we focused on the detainees held at the BOP's Metropolitan Detention Center in Brooklyn, New York, and at the Passaic County Jail in Paterson, New Jersey, because the majority of September 11 detainees were held in these two facilities, and because many complaints arose regarding their treatment.

In conducting our review, we were mindful of the circumstances confronting the Department and the country as a result of the September 11 attacks, including the massive disruptions they caused. The Department was faced with monumental challenges, and Department employees worked tirelessly and with enormous dedication over an extended period to meet these challenges.

It is also important to note that nearly all of the 762 aliens we examined violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation. In other times, many of these aliens might not have been arrested or detained for these violations. However, the September 11 attacks changed the way the Department, particularly the FBI and the INS, responded when encountering aliens who were in violation of their immigration status. It was beyond the scope of this review to examine the specific law enforcement decisions regarding who to arrest or detain. Rather, we focused primarily on the treatment of the aliens who were detained.

While recognizing the difficult circumstances confronting the Department in responding to the terrorist attacks, we found significant problems in the way the September 11 detainees were treated. The INS did not serve notices of the immigration charges on these detainees within the specified timeframes. This delay affected the detainees in several ways, from their ability to understand why they were being held, to their ability to obtain legal counsel, to their ability to request a bond hearing.

In addition, the Department instituted a policy that these detainees would be held until cleared by the FBI. Although not communicated in writing, this "hold until cleared" policy was clearly understood and applied throughout the Department. The policy was based on the belief – which turned out to be erroneous – that the FBI's clearance process would proceed quickly. Instead of taking a few days as anticipated, the clearance process took an average of 80 days, primarily because it was understaffed and not given sufficient priority by the FBI.

We also found that the FBI and the INS in New York City made little attempt to distinguish between aliens who were subjects of the PENTTBOM investigation and those encountered coincidentally to a PENTTBOM lead. Even in the chaotic aftermath of the September 11 attacks, we believe the FBI should have taken more care to distinguish between aliens who it actually suspected of having a connection to terrorism from those aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with a PENTTBOM lead. Alternatively, by early November 2001, when it became clear that the FBI could not complete its clearance investigations in a matter of days or even weeks, the Department should have reviewed those cases and kept on the list of September 11 detainees only those for whom it had some basis to suspect a connection to terrorism.

The FBI's initial classification decisions and the untimely clearance process had enormous ramifications for the September 11 detainees. The Department instituted a "no bond" policy for all September 11 detainees. The evidence indicates that the INS raised concerns about this blanket "no bond" approach, particularly when it became clear that the FBI's clearance process was slow and the INS had little information in many individual cases on which to base its continued opposition to bond. The INS also raised concerns about the legality of holding aliens to conduct clearance investigations after they had received final orders of removal or voluntary departure orders. We found that the Department did not address these legal issues in a timely way.

The FBI's classification of the detainees and the slow clearance process also had important ramifications on their conditions of confinement. Many aliens characterized by the FBI as "of high interest" to the September 11 investigation were detained at the MDC under highly restrictive conditions. While the FBI's classification decisions needed to be made quickly and were based on less than complete information, we believe the FBI should have exercised more care in the process, since it resulted in the MDC detainees being kept in the highest security conditions for a lengthy period. At the least, the FBI should

have conducted more timely clearance checks, given the conditions under which the MDC detainees were held.

Our review also raised various concerns about the treatment of these detainees at the MDC. For example, we found that MDC staff frequently – and mistakenly – told people who inquired about a specific September 11 detainee that the detainee was not held at the facility when, in fact, the opposite was true. In addition, the MDC's restrictive and inconsistent policies on telephone access for detainees prevented them from obtaining legal counsel in a timely manner.

With regard to allegations of abuse, the evidence indicates a pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11 detainees, particularly during the first months after the attacks. Although most correctional officers denied any such physical or verbal abuse, our interviews and investigation of specific complaints developed evidence that abuse had occurred.

We also concluded that, particularly at the MDC, certain conditions of confinement were unduly harsh, such as illuminating the detainees' cells for 24 hours a day. Further, we found that MDC staff failed to inform MDC detainees in a timely manner about the process for filing complaints about their treatment.

The September 11 detainees held at Passaic had much different, and significantly less harsh, experiences than the MDC detainees. The Passaic detainees were housed in the facility's general population and treated like other INS detainees held at the facility. Although we received some allegations of physical and verbal abuse, we did not find evidence of a pattern of abuse at Passaic as we did at the MDC. However, we found that the INS did not conduct sufficient and regular visits to Passaic to ensure the conditions of confinement were appropriate.

In sum, while the chaotic situation and the uncertainties surrounding the detainees' connections to terrorism explain some of these problems, they do not explain them all. We believe the Department should carefully consider and address the issues described in this report, and we therefore offered a series of recommendations regarding the systemic problems we identified in our review. They include recommendations to ensure a timely clearance process; timely service of immigration charges; careful consideration of where to house detainees with possible connections to terrorism, and under what kind of restrictions; better training of staff on the treatment of these detainees; and better oversight of the conditions of confinement. We believe these recommendations, if fully implemented, will help improve the

Department's handling of detainees in other situations, both larger scale and smaller scale, that may arise in the future.

4/29/03
Date

Glenn A. Fine
Inspector General

APPENDIX A

GLOSSARY OF NAMES IN THE REPORT

Ashcroft, John	Attorney General of the United States
Ayers, David	Chief of Staff to the Attorney General
Becraft, Michael	Acting Deputy Commissioner, Immigration and Naturalization Service
Bendl, Brian	Deputy Warden, Passaic County Jail
Cadman, Daniel	Director, National Security Unit, Field Operations Division (INS)
Carpenter, Dea	Deputy General Counsel (INS)
Caruso, Tim	Deputy Executive Assistant Director (FBI)
Cerda, Victor	Chief of Staff to the Commissioner (INS)
Chertoff, Michael	Assistant Attorney General, Criminal Division (Department of Justice)
Cooksey, Michael	Assistant Director for Correctional Programs (BOP)
Cooper, Owen ("Bo")	General Counsel (INS)
Elwood, Kenneth	District Director, Philadelphia District (INS)
Fisher, Alice	Deputy Assistant Attorney General, Criminal Division (Department of Justice)
Hussey, Thomas	Director, Office of Immigration Litigation, Civil Division (Department of Justice)
Israelite, David	Deputy Chief of Staff to the Attorney General
Kelley, David	Deputy United States Attorney, Southern District of New York (Department of Justice)
Kerr, Raymond	Supervisory Special Agent in Charge, I-44A Squad, New York Field Office (FBI)

Kinnally, Tom	Chief, National Domestic Preparedness Office (FBI)
Laufman, David	Chief of Staff to the Deputy Attorney General
Levey, Stuart	Associate Deputy Attorney General
Levin, Dan	Counselor to the Attorney General
Maxwell, Kenneth	Assistant Special Agent in Charge, New York Field Office (FBI)
Meyers, Charles	Warden, Passaic County Jail
Molerio, Dan	Assistant District Director for Investigations, INS New York District
Mueller, Robert	Director, Federal Bureau of Investigation
Parkinson, Larry	General Counsel (FBI)
Pearson, Michael	Executive Associate Commissioner for Field Operations (INS)
Perkins, Kevin	Section Chief, Inspection Division (FBI)
Pickard, Thomas	Deputy Director, Federal Bureau of Investigation
Quarantillo, Andrea	District Director, Newark District (INS)
Rardin, David	Former Director, Northeast Region (BOP)
Ray, Mickey	Director, Northeast Region (BOP)
Rolince, Michael	Chief, International Terrorism Operations Section, Counterterrorism Division (FBI)
Rozos, Michael	Chief, Long Term Review Branch (INS)
Thompson, Larry	Deputy Attorney General
Vanyur, John	Senior Deputy Assistant Director, Correctional Programs Division (BOP)

Venturella, David	Deputy Executive Associate Commissioner, Office of Detention and Removal (INS)
Watson, Dale	Assistant Director, Counterterrorism Division (FBI)
Wray, Chris	Principal Associate Deputy Attorney General
Zenk, Michael	Warden, Metropolitan Detention Center (BOP)
Ziglar, James	Commissioner, Immigration and Naturalization Service

Note: Individuals mentioned by name in the report are, for the most part, identified using the titles they held at the time of the event or action under examination.

APPENDIX B

GLOSSARY OF TERMS

ADMAX SHU	Administrative Maximum Special Housing Unit (BOP)
A-File	Alien File - maintained by the INS; contains an alien's immigration history.
BIA	Board of Immigration Appeals, Department of Justice
BOP	Federal Bureau of Prisons
BOP Region	The BOP divides the United States into six regions; each region is responsible for BOP facilities located within its jurisdiction.
CIA	Central Intelligence Agency
CRU	Custody Review Unit (INS)
Department	U.S. Department of Justice
DHS	Department of Homeland Security
D&R	Office of Detention and Removal - the INS division responsible for detaining aliens pending their removal from the United States for violating immigration laws.
EC	Electronic communication refers to a messaging system used by the FBI to electronically communicate between FBI offices or within an FBI office.
EOIR	Executive Office of Immigration Review (Department of Justice)
FBI	Federal Bureau of Investigation
FBI Field Office	The FBI operates 56 Field Offices located in cities throughout the United States.

Habeas corpus	Latin term literally translated as "that you may have the body," refers to a legal pleading in which a federal court is requested to order a government official to undertake a particular action.
I-44A Squad	Unit created by the FBI's New York Field Office to follow up on PENTTBOM leads. This squad also had responsibility for clearing detainees arrested in connection with the PENTTBOM investigation in the New York City area.
IGA	Intergovernmental Service Agreement; in this review, relates to a contracts between government agencies to provide services.
INA	Immigration and Nationality Act - created by Pub. L. No. 82-414 (1952) and as amended by Pub. L. No. 107-296 (2002).
INS	Immigration and Naturalization Service (as of March 1, 2003, part of the Department of Homeland Security)
INS Custody List	The list maintained by the INS containing names of September 11 detainees.
INS District	The INS operated 33 Districts located in cities throughout the United States; each District was responsible for administering immigration programs within its jurisdiction.
INS Form G-28	Notice of Entry of Appearance as Attorney or Representative – filed with the INS by the attorney of record representing a detainee.
INS Form I-213	Record of Deportable/Inadmissible Alien – the INS arrest report.
INS Form I-286	Notice of Custody Determination - form used by an INS detainee to request a bond re-determination hearing.

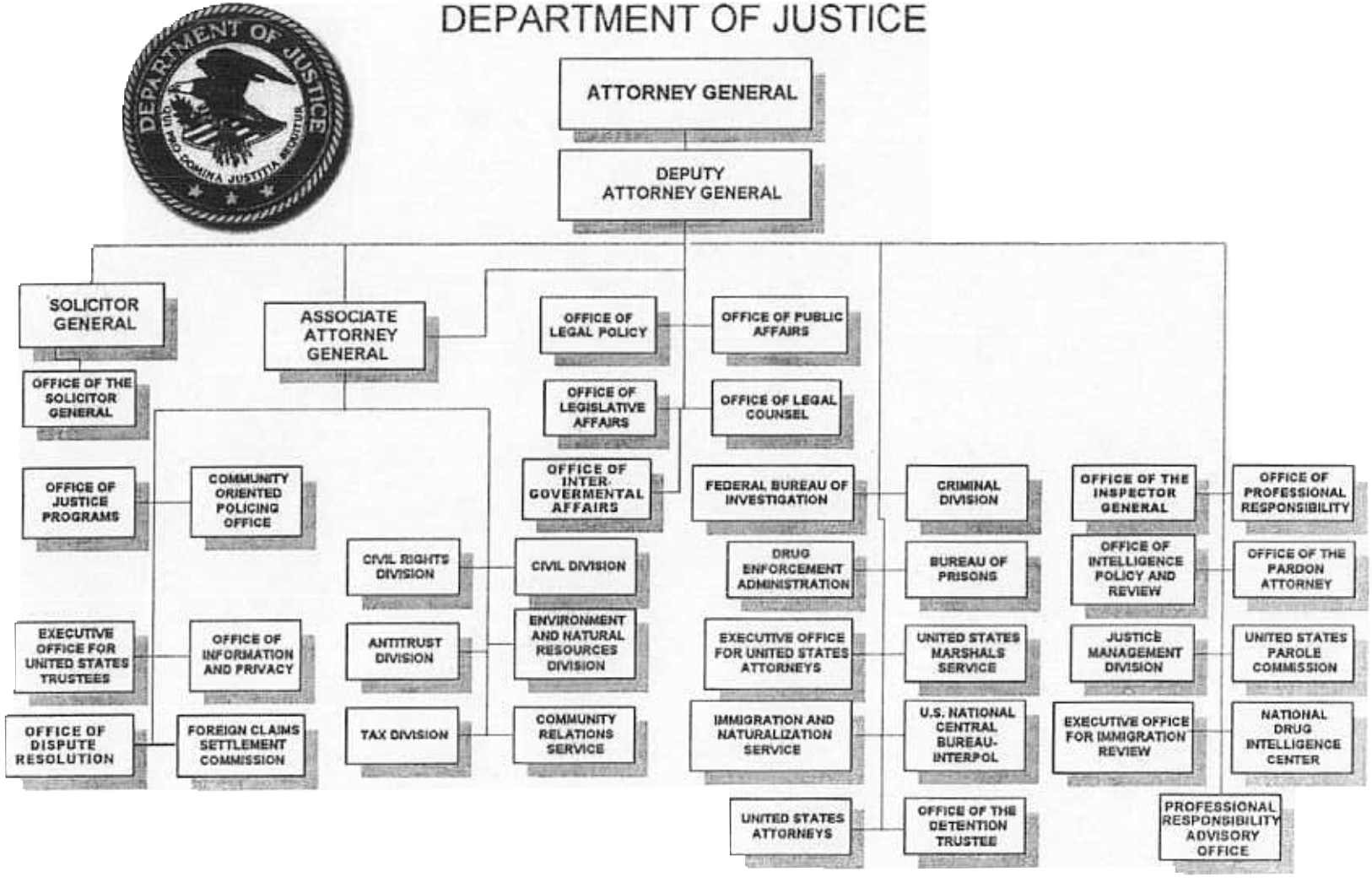
INS Form I-862	Notice to Deportable Alien – also known as the Notice to Appear or NTA (the "charging document" in an immigration case).
INS Region	The INS field structure included three regions – Eastern, Central, and Western – that reported to INS Headquarters and were responsible for administering immigration programs within their jurisdictions.
ITOS	International Terrorism Operations Section, Counter-terrorism Division (FBI)
JTTF	Joint Terrorism Task Force – multi-agency terrorism task force led by the FBI.
Management Interest Group 155	Second designation applied to September 11 detainees held at MDC (first designation was "Witness Security" inmates or WITSEC).
MCC	Metropolitan Correctional Center in Manhattan, New York (BOP)
MDC	Metropolitan Detention Center in Brooklyn, New York (BOP)
NSLD	National Security Law Division, Office of the General Counsel (INS)
NSLU	National Security Law Unit, OGC (FBI)
NSU	National Security Unit, Field Operations Division (INS)
NTA	Notice to Appear – INS Form I-862, Notice to Deportable Alien (the "charging document" in an immigration case).
OGC	Office of General Counsel
OIG	Office of the Inspector General (Department of Justice)
OIL	Office of Immigration Litigation, Civil Division (Department of Justice)

OLC	Office of Legal Counsel (Department of Justice)
Passaic County Jail	Referred to as "Passaic" in the report, the jail is located in Paterson, New Jersey.
PENTTBOM	Name given to the FBI's investigation of the September 11, 2001, Pentagon/Twin Towers Bombings.
POCR	Post Order Custody Review – the INS review required after a detainee has remained in INS custody for 90 days after issuance of a final order of removal by an Immigration Judge. The purpose of the review is to determine whether the detainee's continued detention is warranted.
Pro Bono List	A list of attorneys willing to represent immigration clients without compensation. The INS is required to provide this list to detainees.
SENTRY	Database used by the BOP to monitor the movement and management of all BOP inmates.
SDO	Supervisory Detention Officer (INS)
SDU	Special Detention Unit (Passaic)
SHU	Special Housing Unit (MDC)
SIOC	Strategic Information and Operations Center at FBI Headquarters in Washington, D.C.
SIOC Working Group	Group established to coordinate efforts among the various Department components that had an investigative interest in or responsibility for the September 11 detainees. This group became known as the "SIOC Working Group" because its initial meetings took place in the FBI's SIOC. Members of the group included representatives from the FBI, INS, the

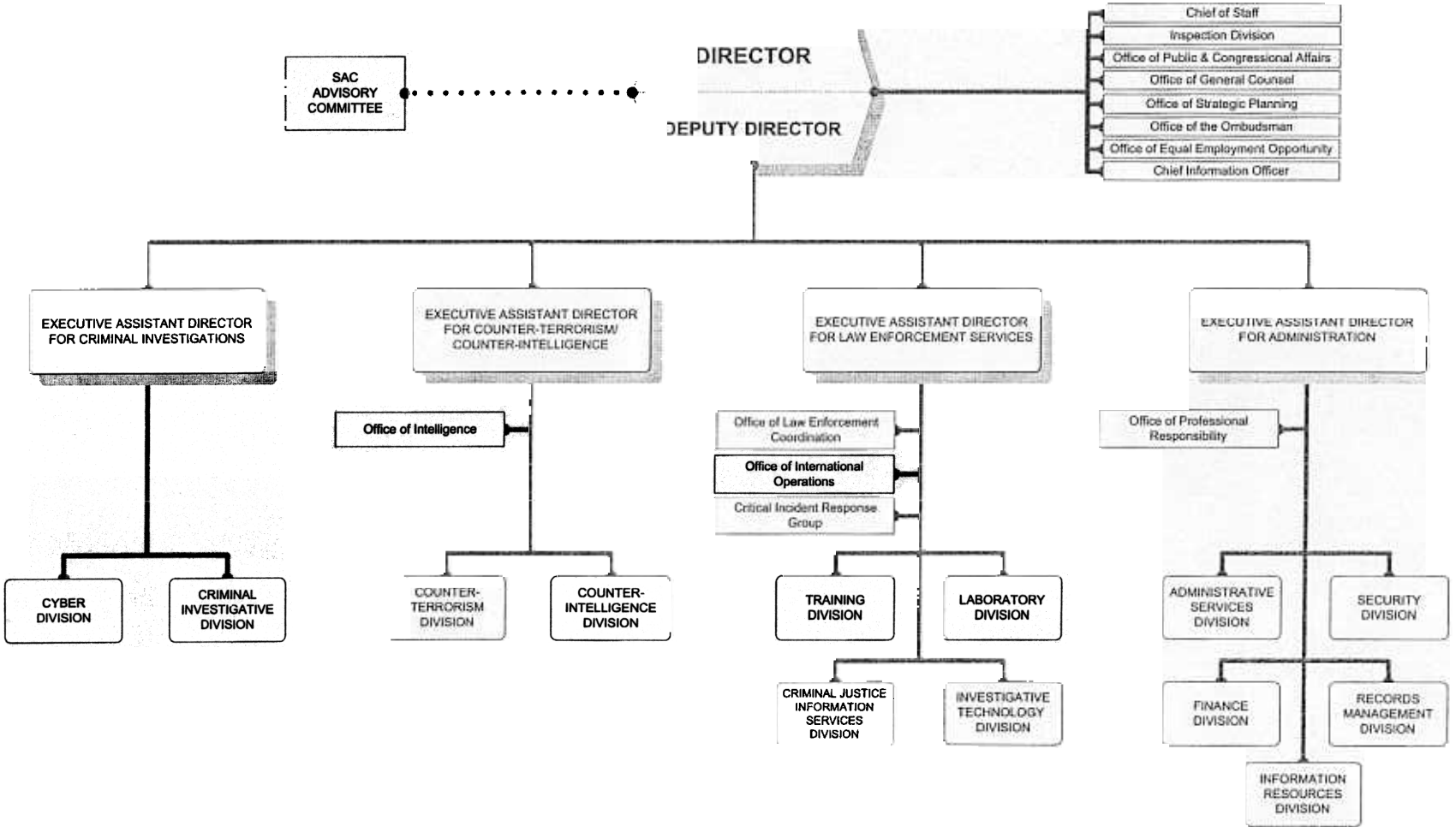
	Department's Office of Immigration Litigation, the Terrorism and Violent Crime Section of the Department's Criminal Division, and the Office of the Deputy Attorney General.
SPC	Service Processing Center - facility where the INS processes and detains illegal aliens who are awaiting disposition of their immigration cases or awaiting removal from the country.
Special SIS Case	Third designation used by the BOP for September 11 detainees. The MDC's Special Investigative Staff (SIS) supervised information and visitation policies concerning September 11 detainees.
SSA	Supervisory Special Agent (INS, FBI)
TVCS	Terrorism and Violent Crime Section, Criminal Division (Department of Justice)
USA PATRIOT Act	The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Pub. L. No. 107-56 (2001).
USMS	United States Marshals Service
WITSEC	"Witness Security" inmate - WITSEC was the first designation applied by the BOP to the September 11 detainees.

APPENDIX C

DEPARTMENT OF JUSTICE

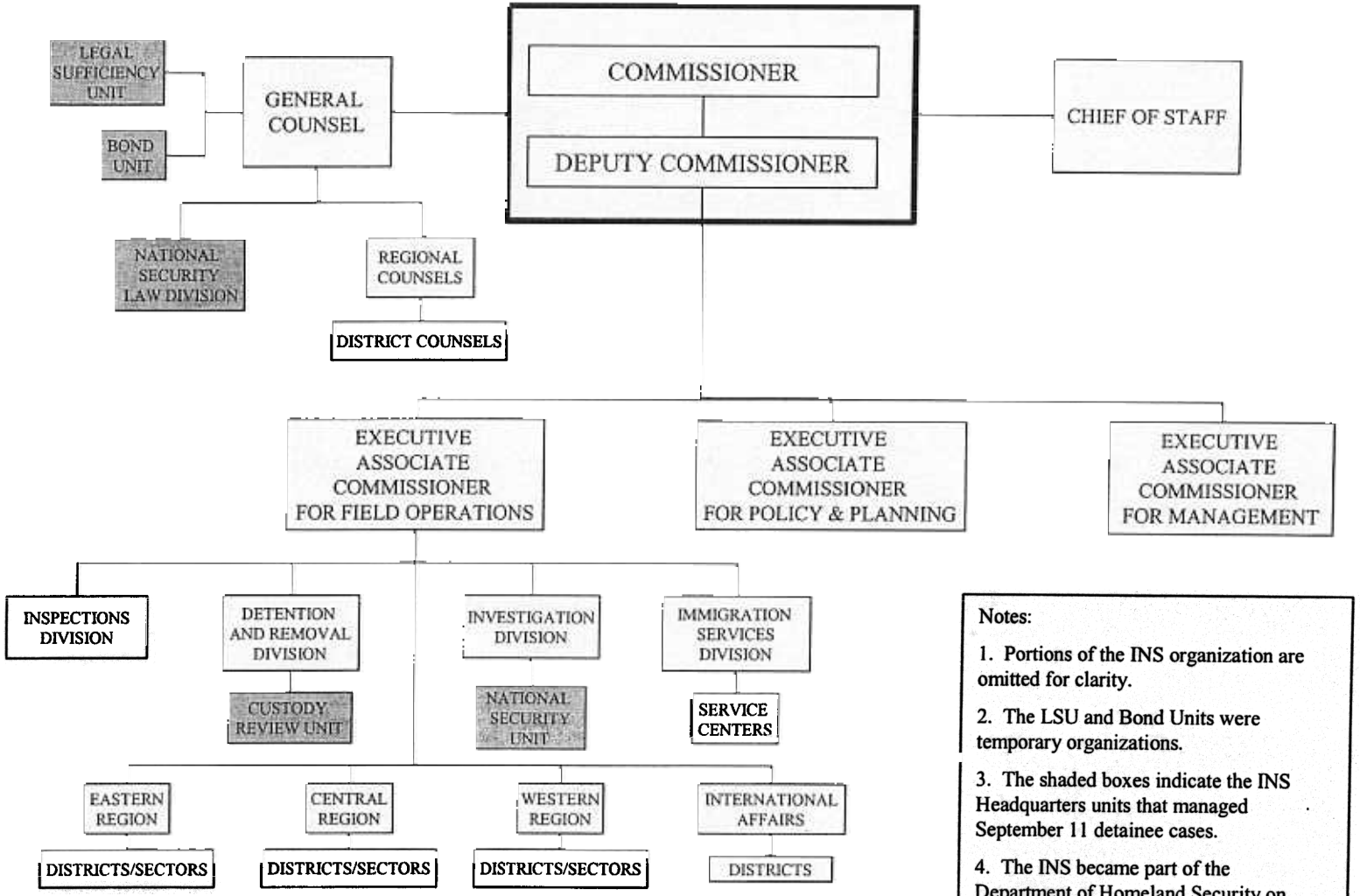


FEDERAL BUREAU OF INVESTIGATION



Original FBI reorganization approved by Congress 11/30/01
However, this organizational structure reflects changes to be submitted in Phase 2, therefore this chart should be considered DRAFT as of 8/06/02

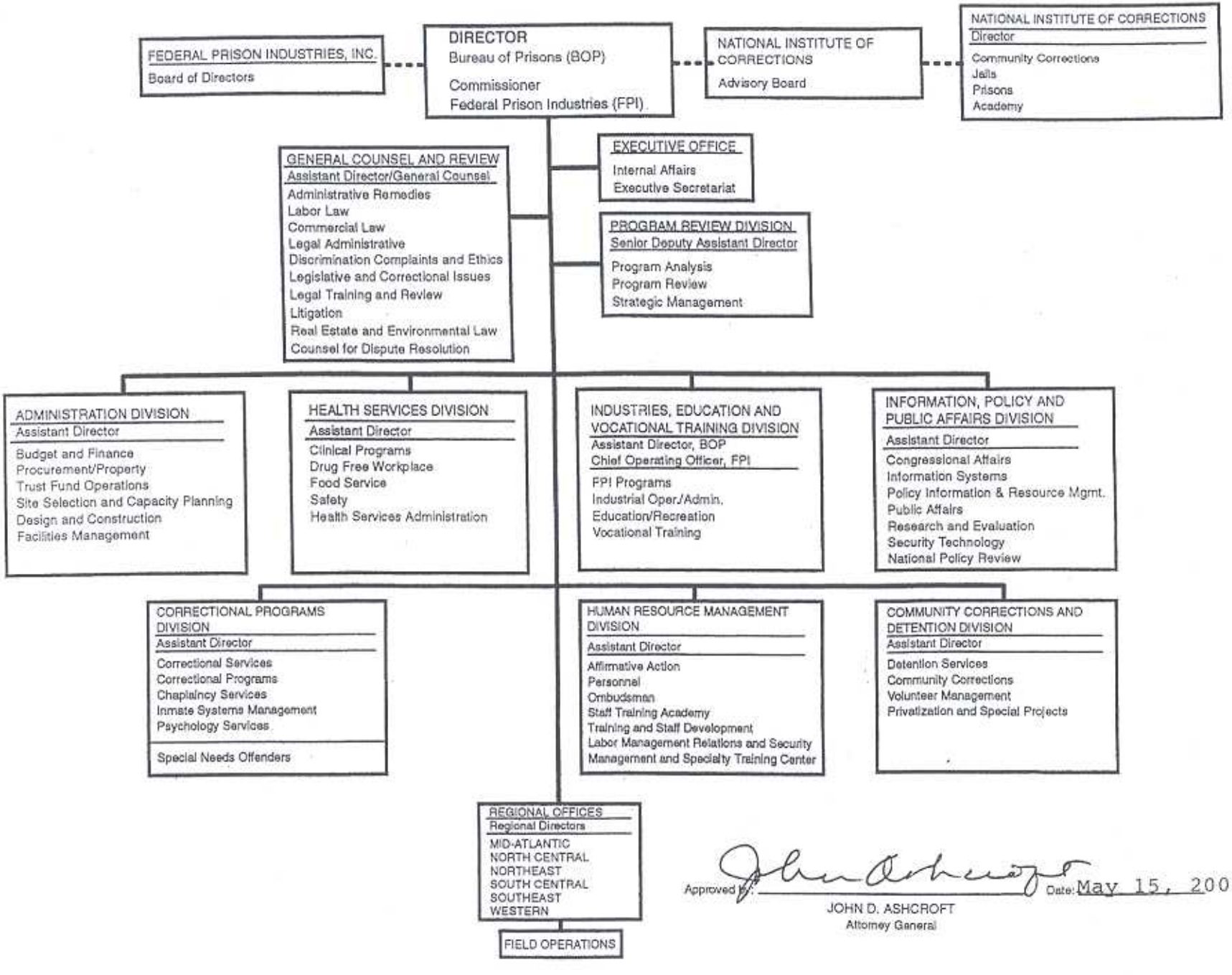
IMMIGRATION AND NATURALIZATION SERVICE



Notes:

1. Portions of the INS organization are omitted for clarity.
2. The LSU and Bond Units were temporary organizations.
3. The shaded boxes indicate the INS Headquarters units that managed September 11 detainee cases.
4. The INS became part of the Department of Homeland Security on March 1, 2003.

FEDERAL BUREAU OF PRISONS



Approved by: _____ Date: May 15, 2001

JOHN D. ASHCROFT
Attorney General

APPENDIX D

U. S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No: _____

In the Matter of:

Respondent: _____ _____ **currently residing at:**

_____ _____
(Number, street, city, state and ZIP code) (Area code and phone number)

☐ **1. You are an arriving alien.**

☐ **2. You are an alien present in the United States who has not been admitted or paroled.**

☐ **3. You have been admitted to the United States, but are deportable for the reasons stated below.**

The Service alleges that you:

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

☐ **This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture**

Section 235(b)(1) order was vacated pursuant to: ☐ **8 CFR 208.30(f)(2)** ☐ **8 CFR 235.3(b)(5)(iv)**

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

(Complete Address of Immigration Court, including Room Number, if any)

on _____ **at** _____ **to show why you should not be removed from the United States based on**
(Date) (Time)

the charge(s) set forth above.

(Signature and Title of Issuing Officer)

Date: _____
(City and State)

See reverse for important information

Form I-862 (Rev. 3-22/99)N

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

(Signature of Respondent)

Before:

(Signature and Title of INS Officer)

Date: _____

Certificate of Service

This Notice To Appear was served on the respondent by me on _____ (Date), in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☐ in person ☐ by certified mail, return receipt requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☐ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served)

(Signature and Title of Officer)

APPENDIX E

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

December 12, 2001

Mr. Michael E. Pearson
Executive Associate Commissioner
Field Operations
Immigration and Naturalization Service

Re: PENTTBOM-FBI Major Case #182-INS Custody List

Dear Mr. Pearson:

Please be advised that after consultation with FBI Headquarters and the appropriate field offices, the FBI has determined that presently there is no investigative interest in the following persons in connection with the PENTTBOM investigation:

NAME	DATE OF BIRTH	INS NUMBER

As a result, the FBI consents to the removal of the above listed persons from the Immigration and Naturalization's Custody List that was created in connection with this investigation.

Sincerely,

Michael E. Rolince

Michael E. Rolince
Chief
International Terrorism
Operations Section
Counterterrorism Division

APPENDIX F

U.S. Department of Justice

Immigration and Naturalization Service

Record of Deportable/Inadmissible Alien

Family Name (CAPS)	First	Middle	Sex	Hair	Eyes	Cmplxn
Country of Citizenship	Passport Number and Country of Issue	File Number	Height	Weight	Occupation	
U.S. Address			Scars and Marks			
Date, Place, Time, and Manner of Last Entry		Passenger Boarded at	F.B.I Number		☐ Single ☐ Divorced ☐ Married ☐ Widower ☐ Separated	
Number, Street, City, Province (State) and Country of Permanent Residence			Method of Location/Apprehension			
Date of Birth	Date of Action	Location Code	At/Near		Date/Hour	
City, Province (State) and Country of Birth	AR ☐	Form: (Type and No. Lifted ☐ Not Lifted ☐	By			
NIV Issuing Post and NIV Number	Social Security Account Name		Status at Entry		Status When Found	
Date Visa Issued	Social Security Number		Length of Time Illegally in U.S.			

Immigration Record	Criminal Record
Name, Address, and Nationality of Spouse (Maiden Name, if Appropriate)	Number and Nationality of Minor Children
Father's Name, Nationality, and Address, if Known	Mother's Present and Maiden Names, Nationality, and Address, if Known

Monies Due/Property in U.S. Not in Immediate Possession	Fingerprinted? ☐ Yes ☐ No	INS Systems Checks	Charge Code Word(s)

Name and Address of (Last)/(Current) U.S. Employer	Type of Employment	Salary Hr.	Employed from/to

Narrative (Outline particulars under which alien was located/apprehended. Include details not shown above regarding time, place and manner of last entry , attempted entry, or any other entry, and elements which establish administrative and/or criminal violation. Indicate means and route of travel to interior.)

Alien has been advised of communication privileges. _____(Date/Initials)

(Signature and Title of INS Official)

Distribution:	Received: (Subject and Documents) (Report of Interview) Officer: _____ on: _____ 19____ at _____ (time) Disposition: _____ Examining Officer: _____

APPENDIX G

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Custody Determination

File No: _____
Date: _____

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

- ☐ detained in the custody of this Service.
- ☐ released under bond in the amount of $_____.
- ☐ released on your own recognizance.

☐ You may request a review of this determination by an immigration judge.
☐ You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.

(Signature of authorized officer)

(Title of authorized officer)

(INS office location)

☐ I do ☐ do not request a redetermination of this custody decision by an immigration judge.
☐ I acknowledge receipt of this notification.

_____ _____
(Signature of respondent) (Date)

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ District Director ☐ Board of Immigration Appeals

The results of the redetermination/reconsideration are:

☐ No change - Original determination upheld.
☐ Detain in custody of this Service.
☐ Bond amount reset to _____
☐ Release - Order of Recognizance
☐ Release - Personal Recognizance
☐ Other: _____

(Signature of officer)

APPENDIX H

U.S. Department of [redacted]
Immigration and Naturalization Service

HQOPS 50/18 - C

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

FEB 11 2002

MEMORANDUM FOR NEW YORK DISTRICT DIRECTOR, EDWARD J. MCELROY

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Removal of [redacted], From INS Custody List

A determination has been made that [redacted], is not of investigative interest to the Federal Bureau of Investigation. As a result, the SUBJECT has been removed from the INS Custody List. Please follow normal due process procedures in the handling of this case and advise the Custody Review Unit if the SUBJECT is released or removed from the United States.

APPENDIX I

U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/18 - C

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

NOV 1 2001

MEMORANDUM FOR NEW YORK DISTRICT DIRECTOR EDWARD J. MC ELROY

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Authorization to Release on Bond for [redacted]

A determination has been made that SUBJECT, [redacted], is of no further investigative value to the FBI. Should an Immigration Judge grant a bond and it is posted, you are authorized to release the SUBJECT.

Since this authorization is predicated upon a verbal notification from FBI Headquarters indicating "No Interest", the SUBJECT shall remain on the INS Custody List until such time as written notification from FBI Headquarters and subsequent approval from Headquarters allows for transfer to the INS Custody Inactive List.

Should the SUBJECT be released from INS custody, notify this office immediately. If in subsequent proceedings, the SUBJECT is ordered removed, please contact the Director of the Custody Review Unit for further instructions at 202-307-1278.

APPENDIX J

U.S. Department of Justice

Federal Bureau of Prisons

Washington, DC 20534

March 29, 2002

MEMORANDUM FOR ALL CHIEF EXECUTIVE OFFICERS

FROM: //s//
Michael B. Cooksey, Assistant Director
Correctional Programs Division

SUBJECT: Assignment of Inmates to Management Interest Group 155/Release of Inmates to General Population

Based on recent information from the Federal Bureau of Investigation (FBI), inmates listed on the attached page are no longer of interest to the FBI as related to the PENTTBOM or subsequent investigations. These inmates will be removed from Management Interest Group 155 and are no longer required to be housed subject to the conditions outlined in my October 1, 2001, memorandum, entitled "Guidance for Handling of Terrorist Inmates and Recent Detainees." Unless you have reason to do otherwise, these inmates can now be housed in general population (GP), and may be subject to the same conditions as any other inmate or detainee in your facility that is a GP inmate. However, we suggest you place these inmates on your regular telephone and mail monitoring lists for the immediate future.

As information is received from the FBI, updates will be provided as to other inmates who can be released to GP. Thank you for your ongoing assistance in this matter. If you have any questions regarding this matter, feel free to contact either John Vanyur or Bill Taylor, Chief of Intelligence.

2002 APR -2 PM 12:03

SENSITIVE
LIMITED OFFICIAL USE ONLY

*INMATES IN BOP CUSTODY WITH INS/FBI LETTERS INDICATING "**NO INTEREST**"*

Name	Register Number	Institution	Quarters
		MDC Brooklyn	May return to GP

APPENDIX K

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

April 4, 2003

MEMORANDUM TO: GLENN A. FINE
INSPECTOR GENERAL

FROM: LARRY D. THOMPSON
DEPUTY ATTORNEY GENERAL

SUBJECT: OIG Review of September 11 Detainees

I am writing in response to your request that I review and comment on the OIG's Draft Report concerning the September 11 detainees.

In considering the issues raised about the detention and removal of the September 11 detainees, in Chapter Six, it is important to take into account the circumstances and atmosphere within the Department of Justice during that period. On September 11, 2001, terrorists murdered 3,000 innocent people on American soil. The period thereafter was one of tremendous intensity as the Department was required immediately to alter its central mission to the prevention of further acts of terrorism.

The circumstances required the Department to respond, in a crisis atmosphere, to hundreds of novel issues. The members of my staff who tried to coordinate these issues had to shoulder a monumental task and workload. They had a great number of other responsibilities during this period as part of our comprehensive effort to protect the American people from further acts of terrorism.

The detention of those illegal aliens suspected of involvement with terrorism was paramount to that mission. My staff understood that the immigration authorities of the Department should be used to keep such people in custody until we could satisfy ourselves – by the FBI clearance process – that they did not mean to do us harm.

Given those circumstances, I respectfully submit that it is unfair to criticize the conduct of members of my staff during this period. In light of the imperative placed on these detentions by the Department, I would not have expected them to reconsider the detention policy in the absence of a clear warning that the law was being violated. It is clear from the Draft Report that that did not occur until January 2002. When the issue was squarely presented, it is apparent that they promptly did the right thing: they changed the policy.

To the extent that OIG still believes that criticism is warranted, I ask that it be directed at my Office as a whole rather than at the individual members of my staff who, as indicated above, acted in accordance with my expectations.

I ask that you include the text of this letter in the section of your report analyzing the removal of the September 11 detainees.